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82-6695

No. _____

In The

Supreme Court of the United States

October Term, 1983

RUSSELL THOMAS PALMER, JR.,

Cross-Petitioner

versus

TED S. HUDSON,

Cross-Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I.

Does the intentional deprivation of property by an official abuse of power constitute a due process violation notwithstanding the existence of state remedies?

II.

Does the intentional deprivation of property by an official abuse of power constitute a due process violation when state relief is uncertain?

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OPINIONS BELOW

The opinion of the United States District Court for the Western District of Virginia is unreported and is included as Appendix A to the Petition for Writ of Certiorari. The opinion of the Court of Appeals is as yet unreported and is included as Appendix B to the Petition for Writ of Certiorari.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered January 6, 1983. Cross-Respondent filed a Petition for Writ of Certiorari which was received on April 6, 1983. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1). Cross-Petitioner relies upon Rule 19.5 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution, which provides, in pertinent part:

> ...[N]or shall any State deprive any person of life, liberty, or property, without due process of law; ...

This case also involves Title 42 U.S.C. §1983, which provides, in pertinent part:

> Every person who, under color of any statute, ... , custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured ...

STATEMENT OF THE CASE

On September 28, 1981, Plaintiff Palmer, Cross-Petitioner herein, brought a *pro se* §1983 suit against Defendant Hudson, Cross-Respondent herein, who is a guard at the Bland Correctional Center. Plaintiff alleged that he was subjected to destructive, ransacking searches by Defendant for no purpose other than to harass and that during such searches noncontraband property belonging to Plaintiff was destroyed. Plaintiff further alleged other forms of harassment by Defendant Hudson.

On November 17, 1981, the United States District Court for the Western District of Virginia entered summary judgment against Plaintiff, ruling that the allegations, if true, did not state a constitutional deprivation.

Plaintiff timely appealed to the Fourth Circuit Court of Appeals. On January 6, 1983, the Court of Appeals held that, while the allegations did state a possible Fourth Amendment violation, the intentional taking and destruction of property was governed by this Court's decision in *Parratt v. Taylor* and that there was no due process violation.

REASONS FOR GRANTING WRIT OF CERTIORARI

I.

PARRATT V. TAYLOR WAS MISAPPLIED TO THIS CASE INVOLVING INTENTIONAL, ABUSIVE DEPRIVATION OF PROPERTY BY AN OFFICIAL.

In *Parratt v. Taylor*, 451 U.S. 527 (1981), this Court addressed the question of whether or not an accidental deprivation of property by a state official constitutes a due process violation when a state court provides a postdeprivation remedy as by suit for tort. Similar to the reasoning of the earlier case of *Baker v. McCollan*, 443 U.S. 137 (1979), where this Court addressed negligent deprivations of liberty, this Court's plurality *Parratt* opinion held that such official negligence does not rise to the level of a due process violation where a state court provides a suitable postdeprivation remedy.

In the present case, Plaintiff Palmer alleged willful, malicious destruction of his property by a prison guard as a means of harassment and an abuse of power. The Fourth Circuit Court of Appeals decided that the *Parratt* holding applied to intentional deprivations as claimed by Palmer. However, for the reasons set forth below, the Court of Appeals misapplied *Parratt* to the present case.

A. *A deprivation caused by an official abuse of power is a due process violation notwithstanding theoretical state court remedies.*

As noted in several separate opinions to the *Parratt* decision, *Parratt* did not present an intentional deprivation of property. While the rationales of the opinions differed slightly as to why intentional deprivations can be distinguished from negligent losses, one primary principle lies at the core of each: The Fourteenth Amendment and the civil rights acts are intended to prevent abuses of power above all. Where an official's wrongful taking of property is not a mistake but intentional, such action takes on the characteristics of state procedure, the imprimatur of the state. Such officials "carry a badge of authority of a State and

represent it in some capacity whether they act in accordance with their authority or misuse it." *Monroe v. Pape*, 365 U.S. 167, 172 (1961); *cf. Lugar v. Edmundson Oil Co.*, ___ U.S. ___, 73 L.Ed.2d 482, 495 (1982) (recognizing the same principle under its analysis of state action). Moreover, as an intentional act it can more meaningfully be prevented. *Parratt, supra*, at 546 (Blackmun, J., concurring).

It is no new notion that abuses of power are at the very heart of the civil rights acts. *Monroe v. Pape, supra*, says as much. *Id.* at 172; *cf. Screws v. United States*, 325 U.S. 91, 109 (1945) (plurality opinion) (discussing criminal counterpart of §1983). More recently, in *Briscoe v. Lahue*, ___ U.S. ___, 75 L.Ed.2d 96 (1983), this Court had occasion to recognize again that 42 U.S.C. §1983 is "a section designed to provide remedies for abuses under color of law." *Id.* at ___, 75 L.Ed.2d at 111. This notion has wound, often subtly, throughout many of the civil rights decisions of this Court, serving as an often silent beacon for treatment of civil rights issues and application of the civil rights statutes. *See Paul v. Davis*, 424 U.S. 693 (1976). Thus, deprivation as a result of an intentional abuse of power has reasonably contrasted with simple negligent, accidental deprivation. *See Parratt v. Taylor*, 451 U.S. 527 (1981); *Baker v. McCollan*, 443 U.S. 137 (1979).

Five years before *Parratt*, for example, this Court decided *Paul v. Davis, supra*. The majority held that the case involved simple defamation, not a constitutional violation. The dissent speculated that the majority was simply fearful of transforming negligent torts into §1983 violations. *Id.* at 717. But, as the dissent pointed out, such concern in "groundless" because "[t]he essential element of this type of §1983 action is *abuse* of [one's] *official position.*" *Id.* (Brennan, J., joined by Marshall and White, JJ., dissenting) (emphasis in original).

This abuse of power concept thus anticipated *Baker v. McCollan, supra*, and *Parratt v. Taylor, supra*, in both of which cases intentional deprivation was similarly recognized in separate

opinions as distinguishable. In *Baker v. McCollan*, Mr. Justice Blackmun, writing separately, emphasized the lack of evidence of intent by the sheriff and on that basis concurred. Three Justices dissented because the case involved at least reckless abuse of power.[1]

In *Parratt*, Mr. Justice Powell addressed the abuse of power concept perhaps most overtly, stating, "[Section 1983] was enacted to deter real *abuses* by state officials in the exercise of governmental powers." 451 U.S. at 549 (Powell, J., concurring) (emphasis in original). In expounding on this point, Mr. Justice Powell explained, "Actionable deprivations must be based on misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed wit the authority of state law." *Id.* at 552 n. 10 (quotations omitted). This is so because the Constitution protects against deprivations "by a state officer *who takes* [ ] *by abuse of his office and its power.*" *Id.* (quoting *Screws v. United States*, 325 U.S. 91, 134 (1945) (Rutledge, J., concurring)) (emphasis by Powell, J.).

It is consistent with the fundamental nature of the abuse of power concept that four Justices wrote separately in *Parratt v. Taylor* to emphasize the distinction between the facts of that case and an intentional deprivation. Yet the Fourth Circuit Court of Appeals, together with a number of other Circuits since *Parratt*, has failed to recognize this fundamental distinction. *See, e.g., Rutledge v. Arizona Board of Regents*, 660 F.2d 1345 (9th Cir. 1981), *aff'd sub nom Kush v. Rutledge*, ___ U.S. ___, 51 U.S.L.W. 4356 (1983); *Gilday v. Boone*, 657 F.2d 1 (1st Cir. 1981). *But see, e.g., Brewer v. Blackwell*, 692 F.2d 387 (5th Cir. 1982); *Weiss v. Lehman*, 676 F.2d 1320 (9th Cir. 1982). Focusing

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[1] This Court has, of course, recognized that such an abuse of power can be found in a state procedure which violates due process as well as in an action by an official who abuses his authority. *See Lugar v. Edmondson Oil Co.*, ___ U.S. ___, 73 L.Ed.2d 482 (1982); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). As reflected in the dissenting opinions in *Baker v. McCollan*, 443 U.S. 137, the two concepts can merge into one where the procedure is a matter of faulty practice by an official such as a sheriff.

instead on the "random and unauthorized acts" notion in *Parratt*, the Fourth Circuit reasoned below that, because intentional abuses of power are also random and unauthorized in some sense, they too follow the *Parratt* analysis, and the question turns to the existence of a state remedy. However, while it is true that systematic but deficient state procedures can violate due process, *see, e.g., Lugar v. Edmundson Oil Co., supra,* so can the isolated abuse of official power, *see Monroe v. Pape,* 365 U.S. 167 (1961). The Fourth Circuit's analysis overlooks the fact that many of the types of civil rights violations targeted by Congress in the passage of the civil rights acts were no doubt equally random, isolated, and unauthorized. A sheriff's direction to a posse to lynch a black man would be considered random and unauthorized. But a theoretical state court postdeprivation remedy would make it no less a civil rights violation, and no less the type of act which the civil rights acts were most clearly designed to prevent.

In the present case, Plaintiff has alleged an intentional, abusive taking of property. Such allegation of abuse of power states a due process claim and the Court of Appeals decision was in error.

B. *The intentional deprivation of property by a prison guard in Virginia constitutes a due process violation because Virginia provides no certain postdeprivation remedy.*

Even if the holding of *Parratt v. Taylor,* 451 U.S. 527 (1981), does apply to an intentional, abusive, official taking of property, it would not apply to the facts of this case. This Court, in *Parratt*, held that negligent loss by an official does not in and of itself constitute a due process violation. Concluding that no predeprivation hearing could be expected in connection with an accidental loss, this Court turned its attention to whether reasonable postdeprivation relief was provided by the State of Nebraska. That question was answered in the affirmative and, as a result, this Court held that no due process violation was involved in the facts of *Parratt*.

Unlike the State of Nebraska, however, Virginia does not provide a reliable postdeprivation remedy. Virginia's civil law is still heavily infested with large pockets of immunity often barring relief and sheltering abuses by officials from the light of accountability. Scylla and Charybdis hardly presented greater navigational obstacles than Virginia's immunity decisions present to many litigants attempting to chart a path between "ministerial" and "discretionary" on their journey to postdeprivation relief. *Compare First Virginia Bank-Colonial v. Baker, Clerk*, 225 Va. ____, 225 V.R.R. 62 (1983), *with Banks v. Sellers*, 224 Va. ____, 224 V.R.R. 152 (1982), *with James v. Jane*, 221 Va. 43 (1980), *with Lawhorne v. Harlan*, 214 Va. 405 (1973). At the least, the law is unsettled. As a result, there is no certain postdeprivation remedy against official deprivation *in fact* in Virginia. The holding in *Parratt v. Taylor, supra*, accordingly, does not apply to this case.

II.

LOWER COURTS ARE IN NEED OF GUIDANCE FROM THIS COURT IN THE APPLICATION OF *PARRATT V. TAYLOR*.

The lower federal courts have given this Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981), fundamentally varying application. *Parratt's* holding has been interpreted as applying to intentional as well as negligent deprivations of life, liberty, and property, *see Rutledge v. Arizona Board of Regents*, 660 F.2d 1345 (9th Cir. 1981), *aff'd sub nom Kush v. Rutledge*, ____ U.S. ____, 51 U.S.L.W. 4356 (1983); as applying to intentional as well as negligent deprivations of property, *see Gilday v. Boone*, 657 F.2d 1 (1st Cir. 1981); as applying to negligent taking of property but not intentional taking of property, *see Wright v. Dallas County Sheriff Dept.*, 660 F.2d 623 (5th Cir. 1981); as applying to negligent taking of property but not life, *see Madyun v. Thompson* 657 F.2d 868 (7th Cir. 1981); as applying only to negligent taking of property and when in the presence of an adequate state remedy, *see Hirst v. Gertzen*, 676 F.2d 1252 (9th Cir. 1982), and

as applying only to negligent taking of property and only in the presence of an adequate state remedy and only if a predeprivation hearing is shown to have been impractical, *see Weiss v. Lehman*, 676 F.2d 1320 (9th Cir. 1982).

Application of the decision has divided the Circuits. *Compare Gilday v. Boone*, 675 F.2d 1 (1st Cir. 1981), *and Palmer v. Hudson*, ____ F.2d ____ (4th Cir. 1983), *with Weiss v. Lehman*, 676 F.2d 1320 (9th Cir. 1982), *and Brewer v. Blackwell*, 692 F.2d 387 (5th Cir. 1982).

It has also resulted in inconsistent opinions within the Circuits themselves. *Compare Weiss v. Lehman*, 676 F.2d 1320 (9th Cir. 1982), *with Rutledge v. Arizona Board of Regents*, 660 F. 2d 1345 (9th Cir. 1981), and *Flower Cab Co. v. Petitte*, 685 F.2d 192 (7th Cir. 1982), *with Evans v. City of Chicago*, 689 F.2d 1286 (7th Cir. 1982).

Because of the unquestionable importance of Congress' civil rights acts and their correct and complete usage, federal courts are in need of guidance as to the extent of this Court's opinion in *Parratt* so that it can be applied with consistency.

CONCLUSION

For the reasons set forth above, Cross-Petitioner urges this Court to grant the Writ of Certiorari and to reverse this holding of the Court of Appeals.

Respectfully submitted,

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May 5, 1983

Nos. 82-1630 and 82-6695

In The

Supreme Court of the United States

October Term, 1983

TED S. HUDSON,
v. *Petitioner,*
RUSSELL THOMAS PALMER, JR.,
Respondent.

and

RUSSELL T. PALMER, JR.,
v. *Cross Petitioner,*
TED S. HUDSON,
Cross Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

ADDENDUM

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EMPLOYEE

STANDARDS OF CONDUCT

COMMONWEALTH OF VIRGINIA

DEPARTMENT OF CORRECTIONS

JULY 1, 1981

STANDARDS OF CONDUCT

These Standards of Conduct are designed to protect the well-being and rights of all employees; to assure a safe, efficient government operation, and to assure compliance with public law.

Many of the Conduct Standards will readily be understood and recognized as those that guide behavior with other people anywhere in social or business relationships. Other standards and procedures are more particularly applicable to employees working together in State government.

This policy is for your use and is intended to keep you informed so that employees as well as supervision will be equally aware of each person's responsibility for maintaining a positive and productive work environment.

* * *

The Standards listed below are intended to be illustrative but not all inclusive of the type of conduct expected from State employees.

Timely and Regular Attendance Performance

Planned lost time should be arranged with supervision in advance. Unexpected lost time should be reported as promptly as possible to supervision at the beginning of the employee's work schedule.

Dependable Application of Time

Employees are expected to apply themselves to their assigned duties during the full schedule for which they are being compensated, except for reasonable time provided to take care of personal needs.

Satisfactory Work Performance

Employees are expected to meet established performance standards. Conditions or circumstances, as they become known, which will prevent employees from performing effectively or from completing their assigned tasks should be reported to supervision. Likewise, unclear instructions or procedures should be brought to the attention of supervision.

CORRECTIVE ACTION PROCEDURES

These procedures are designed to:

A. Establish a fair and objective process for correcting or treating unacceptable conduct,

B. Distinguish between less serious and more serious actions of misconduct and provide corrective action accordingly, and

C. Limit corrective action to employee conduct occurring only when employees are at work or when otherwise representing the Commonwealth in an official or work-related capacity, unless otherwise specifically provided for in this procedure.

Unacceptable conduct shall be divided into three types of offenses according to their severity. Specified corrective action for such offenses shall not be exceeded. However, when in the judgement of the agency personnel officer and/or the appointing authority mitigating circumstances exist, specified corrective action may be reduced. (See Mitigating Circumstances page 6)

FIRST GROUP OFFENSES include those types of behavior less severe in nature, but which require correction in the interest of maintaining a productive and well managed work force.

A supervisor should first discuss a first group offense situation with the employee and advise the employee of the need for correction. If the condition is not corrected, the employee should be given a written notice (Form 1) to again indicate to the employee the need for correcting the stated offense.

Active written notices for First Group Offenses shall be cumulative in nature. Such written notices for purposes of corrective action shall remain "active" until 12 months have elapsed since the issuance of the last written notice.

The accumulation of active written notices regardless of the nature of the first group offenses should result in suspension without pay on the third active notice, but such suspension shall not exceed three work days. A fourth active written notice will normally result in removal.

First Group Offenses

- Unsatisfactory attendance performance or excessive tardiness.
- Abuse of State time, such as:

Unauthorized time away from work area or Failure to notify supervisor promptly of completion of assigned work.

- Obscene or abusive language.
- Conviction of a moving traffic violation while using State or other public use vehicles.
- Inadequate or unsatisfactory job performance.

SECOND GROUP OFFENSES include acts and behavior which are more severe. Corrective action for these offenses include a written notice (Form 1) and suspension without pay. Employees, however, may not be suspended in excess of five work days for an offense of this nature. An additional Second Group Offense should normally result in removal. A single offense, coupled with three "active" First Group Offenses, should also normally result in removal.

Second Group Offenses

- Failure to follow supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy.
- Violating safety rules where there is not a threat to life.
- Reporting to work when under the influence of or when ability is impaired by alcohol or the unlawful use of controlled substances.
- Leaving the work site without permission during working hours.
- Failure to report to work without proper and timely notice to supervisor in accordance with written policy.
- Unauthorized use or misuse of State property or records.
- Refusal to work required overtime.

THIRD GROUP OFFENSES include acts and behavior of such a serious nature that a first occurence should normally warrant removal.

Third Group Offenses

- Absence in excess of three days without call in or notice to supervisor.
- Falsifying any records, such as, but not limited to: vouchers, reports, insurance claims, time records, leave records, or other official State documents.
- Willfully or negligently damaging or defacing State records or State or employee property.
- Theft or unauthorized removal of State records or State or employee property.
- Gambling while on duty.
- Acts of physical violence or fighting.
- Violating safety rules where there is a threat to life.
- Sleeping during working hours.
- Participating in any kind of work slowdown, sitdown, or similar concerted interference with State operations.
- Unauthorized possession or use of firearms, dangerous weapons or explosives.
- Criminal convictions for acts of conduct occurring on or off the job which are plainly related to job performance or are of such a nature that to continue the employee in the assigned position could constitute negligence in regard to the agency's duties to the public or to other State employees.
- Leaving a security post without permission during working hours.
- Use of alcohol or unlawful use or possession of controlled substances while on the job.
- Gross negligence on the job which results in the escape, death or serious injury of a ward of the state or the death or serious injury of a state employee.
- Refusal to obey instructions which could result in a weakening of security.
- Physical abuse or other abuse, either verbal or mental, which constitutes serious maltreatment of inmates or wards.

ADDITIONAL SUSPENSION PROVISIONS

In addition to the suspensions provided for above, suspensions without pay may occur for the following reasons, subject to the limitations noted.

A. Suspension Pending Agency Disciplinary Investigation

When a suspension is effected pending completion of a disciplinary investigation into misconduct or violation of established work rules, such suspension shall not exceed 10 work days.

If the employee is cleared of any such alleged violations, the employee shall be reinstated and paid for this period of suspension. Where no finding of violation or decision on disciplinary action occurs within 10 work days, the employee shall be permitted to return to work pending a final decision.

If the appointing authority decides disciplinary action involving suspension is warranted, the period of suspension pending completion of the investigation shall apply to the period of disciplinary suspension.

B. Suspension — Disciplinary Penalty

Suspension for First and Second Group Offenses is provided for elsewhere in this Policy. However, suspension in lieu of removal shall not exceed 10 work days.

C. Suspension Pending Court Action or Official Investigation.

The 10-day time limitation shall not apply when an employee is suspended pending completion of court action or an official investigation, provided such court action or official investigation involves alleged criminal violations that occur on or off the job and are plainly related to job performance or are of such a nature that to continue the employee in the assigned position could constitute negligence in regard to the agency's duties to the public and to other State employees. Upon completion of such court action or official investigation, the employee may be disciplined or removed or may be reinstated with full or partial back pay as the appointing authority determines to be appropriate under the circumstances. ("Official Investigation" shall be limited to interpretation to those investigations conducted by State Police and/or other Federal, State, or local government law enforcement agencies.)

* * *

Notice to Employee: Prior to suspension or removal actions, an employee shall be informed by the agency of the reasons for the suspension or removal, and be given a reasonable opportunity to respond to those reasons. An employee may be immediately suspended or removed, however, where the employee's continued presence may be a substantial threat to the welfare of the agency or fellow employees. In such cases, the employee shall be informed of the reasons for such suspension or removal as soon as possible thereafter and shall then be given a reasonable opportunity to respond to those reasons. A written notice (Form 1) confirming the cause and nature of the suspension or removal actions shall be provided to the employee either before or promptly following such actions.

All written notices shall include a reference to the employee's right to file a grievance.

Personnel Officers' Responsibility: Agency or facility personnel officers shall be responsible for the review of all corrective actions involving suspension and/or removal to determine if mitigating circumstances exist which would otherwise justify modified corrective action and, in appropriate cases, referral to the State Employee Assistance Service. Thereafter, personnel officers shall be responsible for making appropriate recommendations to the appointing authority.

Management Responsibility: Management is responsible to assure that corrective actions are timely, and consistently applied. Moreover, effective corrective action requires that "actions" rather than "personalities" be the subject of fair and objective corrective actions.

Agency Responsibility: Agencies may from time to time supplement this Policy to meet agency oriented needs subject to the prior written approval of the State Director of Personnel and Training. State agencies must insure that all agency employees receive a copy of these conduct rules and any approved supplements and that such rules are included in future issues of the agency's employee handbook.

Use of Grievance Procedure: Employees may use the State grievance procedure on any matters related to the application of this Policy.

State Employee Assistance Service: Referral to this program shall not be considered a substitute for corrective action for a violation of the above offenses. However, prior to the need for corrective action or, in addition to corrective actions provided for in this Policy it is recommended that supervisors refer employees to SEAS where appropriate.

Coverage of Personnel: This Policy applies to employees covered under the Virginia Personnel Act and the employees of local offices of Emergency Services and local Offices of Aging.

Probationary Employees: The above disciplinary procedures do not apply to probationary employees, inasmuch as it is recognized that the failure of the probationary employee to meet conduct standards is grounds for immediate removal.

Mitigating Circumstances: Mitigating circumstances include those conditions related to a given offense that would otherwise serve to support a reduction of corrective action in the interest of fairness and objectivity. Mitigating circumstances may also include consideration of an employee's long service with a history of otherwise satisfactory work performance.

Relationship to Existing Policies: Supersedes Rule 11.3 and 11.5 of the Rules for the Administration of the Virginia Personnel Act and the Commonwealth's Personnel Policy on Standards of Conduct distributed December 13, 1978. This revised Policy shall constitute rules and regulations issued pursuant to the authority provided in Section 2.1-114.5(J) of the Code of Virginia.

Effective Date: July 1, 1981

The offenses listed in this Policy are not intended to be all inclusive. Accordingly, conduct which in the judgement of the Agency Head, although not listed, seriously undermines the effectiveness of the agency's activities or the employee's performance should be treated consistent with provisions of this Policy. A record of such corrective actions must be filed with the State Director of the Department of Personnel and Training, within 10 work days of such action.

WRITTEN NOTICE (Form 1)

Section I

Employee's Name _____ Date of Offense _____

Agency _____ Date of Notice _____

Supervisor's Signature _____

Section II

Type of Offense: (Check one)

Group One ☐ Group Two ☐ Group Three ☐

Nature of Offense: (Describe Briefly)

_____

_____

Section III

Corrective Action(s): In view of the above offense, you are being issued this written notice and _____

(Describe suspension or removal action, if applicable) _____

Section IV*

It is expected that the condition noted above will be corrected immediately. In the event this condition is not corrected, or another offense of this type occurs, the following corrective action may be taken:

Check One
- ☐ Written Notice
- ☐ Written Notice and Suspension Up to 3 Days
- ☐ Written Notice and Suspension Up to 5 Days
- ☐ Written Notice and Removal

* Section IV is not applicable and should not be completed when the corrective action described in Section III is removal.

NOTE: Any employee wishing to appeal the corrective action noted may use the State grievance procedure for this purpose.

AN EQUAL OPPORTUNITY EMPLOYER

DEPARTMENT OF CORRECTIONS
COMMONWEALTH OF VIRGINIA
RICHMOND

DEPARTMENT POLICY

Chapter:	Number:
4—GENERAL ADMINISTRATION	Page: 1 of 10
Subject: Inmate Grievance Procedures	
Date: October 12, 1982	Supersedes: First Issue

4-14.1 PURPOSE: To provide fair and prompt decisions and actions in response to inmate complaints; to provide a regularly available channel for hearing and resolving grievances and concerns of inmates; to provide a mechanism to help keep managers informed and better able to carry out the Department's mission; and to meet national standards, the following policy is hereby established.

4-14.2 DEFINITIONS. (a) An "inmate" is an adult who has been placed in the care of the Department for custody and/or supervision.

(b) "Unit head" means the person in charge of an institution, or other organizational unit of the Department.

(c) "Unit" means an organizational unit of the Department, including adult correctional institutions, field units, and work release units.

(d) "Staff grievance coordinator" means an employee of the unit, appointed by the Superintendent or Warden, who oversees the functioning of the unit's inmate grievance procedure.

4-14.3 ADULT INSTITUTIONAL INMATE GRIEVANCE PROCEDURES. (a) Each correctional unit shall develop an Institutional Operating Procedure (IOP) for inmate grievances that conforms to this policy, and shall submit the proposed procedure to the Regional Administrator, Deputy Director, and Director for approval. (See the Appendix (Attachment #1) to this policy for detailed instructions.)

(b) All grievance procedures shall conform to the Minimum Standards for Inmate Grievance Procedures promulgated pursuant to the Civil Rights of Institutionalized Persons Act, Pub. L. 96-247, 94 Stat. 343 (42 U. S. C. 1997), and shall include the following provisions:

(1) Compliance with standards; formulation. Inmates and employees shall be afforded an advisory role in reviewing the compliance with the Federal minimum standards of an institutional grievance procedure adopted prior to the effective date of the Federal standards. Inmates and employees shall be afforded an advisory role in the formulation and implementation of a grievance procedure adopted after the effective date of the Federal regulations.

4-14.3 This may be accomplished in one of the following ways:

/a/ Review by a committee of at least three inmates and

4-14.3

three employees, in equal numbers. The inmate population must have some choice in the selection of the inmate members. The unit head may appoint the employees, at least one of whom must be at line level and all of whom must have regular contact with inmates.

/b/ A draft of the Institutional Operating Procedure and a copy of the aforementioned Minimum Standards shall be posted for a minimum of one week in an accessible location or locations for employees and inmates. Both groups shall have the opportunity to submit written comments to the unit head, who shall review them and make changes in the IOP as appropriate. Upon submission of the IOP to the Regional Office, copies of all such comments received shall be enclosed.

(2) Communication of Procedures. A written notification of the inmate grievance procedures shall be given to each inmate upon his/her arrival at a reception and classification center or the Virginia Correctional Center for Women. The written grievance procedures shall be readily available for review in locations accessible to the inmate and copies shall be made available upon request. Additionally, upon arrival at each institution or unit, each inmate shall receive written notification of the policy. In both situations, the notification shall contain information regarding:

/a/ how to obtain a grievance form;

/b/ location where grievance policy and IOP may be reviewed;

/c/ time and date of the next scheduled orientation, which shall occur within seven (7) calendar days of the inmate's arrival at the facility. (See Appendix to this policy for a model notification) (Attachment #2)

In the event that an inmate wishes to file a grievance prior to participation in the formal orientation, provisions shall be made for staff to provide assistance so that the inmate's ability to grieve an issue is in no way hindered.

At the orientation at the reception center and the institutions, time shall be allocated for a question and answer period, and provisions shall be made for those not speaking

4-14.3

English, as well as for the impaired and handicapped.

Each employee shall be provided a copy of this policy and the unit/institution grievance IOP during or prior to the first day of employment at the facility. Additionally, within seven calendar days of arrival at the institution, each employee shall receive an oral explanation of the procedure, including the opportunity to have questions regarding the procedure answered orally. Appropriate provisions shall be made for those not speaking English, as well as for the impaired and handicapped.

Additional copies of this policy shall be maintained at each facility and shall be available to inmates and employees upon request.

(3) Accessibility; reprisals. Each inmate shall be entitled to invoke the grievance procedure regardless of any disciplinary, classification, or other administrative or legislative decisions to which the inmate may be subject. The procedure shall be accessible to impaired and handicapped inmates.

No reprisals, either formal or informal, shall be visited upon inmates for filing grievances, or to employees and inmates participating in the resolution of grievances.

(4) Written responses with reasons. At each level of the procedure responses to each grievance shall be made in writing, with reasons for the decisions taken stated clearly.

(5) Time limits. Prompt, reasonable time limits shall be set for all levels of the procedure, with provisions for emergencies and special problems of confidentiality. The total time allowed from initial submission to the last level of review shall not exceed 90 calendar days, unless the grievant agrees in writing to an extension for a fixed period. Maximum time limits for each level are specified below in 4-14.7.

(6) Inmate-employee participation. Inmates and employees must participate in an advisory capacity in the design, operation, and evaluation of institutional grievance procedures including a review of both their effectiveness and

4-14.3 credibility. Inmates may also be involved in grievance intake; provided, however, that no inmate shall be authorized to prevent any other inmate's grievance from being submitted; and provided that only those inmates directly involved in serving on grievance committees shall be allowed access to grievance records. The staff grievance coordinator shall provide appropriate supervision to insure both the confidentiality of grievance records, and the integrity of the intake process.

No inmate or employee who appears to be involved in the matter shall participate in an advisory capacity in the resolution of the grievance, except as a witness if necessary. No inmate shall participate in the resolution of a grievance over the objection of the grievant.

4-14.4 GRIEVABILITY. (a) Grievable. The following matters shall be grievable by inmates:

(1) The substance, interpretation, and application of policies, rules, and procedures of the unit, region, division, and department.

(2) Individual employee and inmate actions, including any denial of access of inmates to the grievance procedure.

(3) Reprisals against inmates or staff for filing a grievance or appeal under the inmate grievance procedure, or for participating in an inmate grievance proceeding.

(4) Any other matter relating to conditions of care or supervision within the authority of the Virginia Department of Corrections, except as noted herein.

(b) Non-grievable. The following matters are not grievable:

(1) State and Federal court decisions;

(2) State and Federal laws and regulations;

(3) Parole Board decisions;

4-14.4 (4) Adjustment Committee decisions, since they may be appealed through another procedure; and

(5) Other matters beyond the control of the Department.

(c) Resolving Grievability. If a grievance is ruled non-grievable at any level, that decision may be appealed through the remaining levels of the grievance procedure.

4-14.5 REMEDIES. The grievance procedure shall afford a successful grievant a meaningful remedy. Although available remedies may vary among institutions, a reasonable range of meaningful remedies in each institution is necessary. Remedies must include, but not be limited to, the following:

(a) Substance of policy, rule, or procedure--written change communicated effectively, promptly, and as extensively as necessary, with instructions for effecting the change if necessary.

(b) Interpretation of policy, rule, or procedure--written explanation of revised interpretation communicated effectively, promptly, and as extensively as necessary, with instructions for effecting the change if necessary.

(c) Application of policy, rule, or procedure--written direction to the relevant employee or employees to apply the policy, rule, or procedure correctly, with instructions for accomplishing the change, if necessary.

(d) Individual employee action or reprisal--indication to inmate that grievance was founded; disciplinary actions against employees, if necessary, shall not be communicated to inmate, but shall be documented.

(e) Individual inmate actions--protection of the grievant, if necessary through re-assignment of one or both parties or through other means; care that action taken does not have the effect of reprisal against the grievant; redress to the grievant as appropriate (e.g., return of stolen property).

(f) Classification grievances--appropriate and prompt classification action (e.g., transfer, reduction of custody, award of furlough, change of work assignment).

4-14.5 (g) Time computation--prompt re-computation with expedited processing of any privileges or improvement in status (e.g., eligibility for reduced custody), if relevant.

(h) Loss of inmate property within the custody and control of the unit--return of property, replacement of property of equal value at time of loss, or monetary payment equal to value of property at time of loss.

(i) Living conditions and facilities--prompt improvement.

4-14.6 LEVELS OF REVIEW. Any inmate who is dissatisfied with the response to a grievance at any level may appeal his/her grievance to the next level, within the requirements set forth below. Appeals shall be allowed automatically without interference by administrators or employees of the institution. Each response shall also state that the grievant is entitled to appeal, if it is available, and shall contain simple directions for making that appeal. Each grievance procedure for inmates shall reflect the following levels of review:

Level 1--Inmate/employee participation. This may be further divided into informal and formal phases. Inmate/employee participation may occur for all grievances except those that are highly confidential, and must occur for all grievances questioning or challenging general policy or practices at any level. In any instance in which inmates and employees are afforded an advisory role in the disposition of an individual grievance, the opportunity for such participation shall occur before the initial adjudication of the grievance.

Inmate/employee participation must take one of the following forms:

(a) formally established inmate-employee grievance committees, in which the inmate population has some choice in the selection of inmate members; the unit head may appoint the employees, at least one of whom must be at line level and all of whom must have regular contact with inmates;

(b) review by existing Inmate Advisory Committees, as well as by a committee of employees who may be selected by the unit head, at least one of whom must be at line level and all of whom must have regular contact with inmates;

4-14.6 (c) review by an ad hoc committee of inmates and employees empaneled solely for review of a particular grievance, chosen as in (a) above;

(d) solicitation of comments in general population meetings and in employee meetings;

(e) solicitation of written comments by inmates and employees on posted or published abstracts of grievances, with adequate time for review and response.

All recommendations at this level shall be forwarded to the

Superintendent/Warden within the time specified in 4-14.7.

Level 2--Superintendent/Warden.

Level 3--Regional Administrator, OR, for grievances against decisions or policies by Central Classification, Central Records, or Central Parole units, the Assistant Director for Classification and Parole Administration. Except as specified below, this is the last level of appeal.

Level 4--Deputy Director/Director. Grievances appealed to Level 4 will be responded to by either the Deputy Director or the Director (but not both), as appropriate. Only grievances questioning or challenging general policy or procedure of the Division of Adult Services or emergency grievances requiring action at this level are appealable to the Deputy Director. Only grievances questioning or challenging general policy or procedure of the Department of Corrections or emergency grievances requiring action at this level are appealable to the Director.

4-14.7 TIME LIMITS. (a) Responses shall be made within fixed time limits at each level of decision. Time limits may vary among institutions, except as indicated below, but expeditious processing of grievances at each level of decision is essential to prevent grievances from becoming moot. Expiration of a time limit at any stage of the process shall entitle the grievant to move to the next stage of the process, unless the grievant has agreed in writing to an extension of the time for a response.

4-14.7 (b) Time limits shall be considered as beginning the date of receipt of the grievance at each level.

(c) Time limits for each level shall not exceed the following:

Level 1--fifteen (15) calendar days;

Level 2--eight (8) calendar days;

Level 3--twenty (20) calendar days;

Level 4--fifteen (15) calendar days.

(d) The grievant shall be allowed five (5) calendar days upon receipt of a response to appeal to the next level, if such appeal is available.

4-14.8 EMERGENCY GRIEVANCES. Special provisions shall be made for responding to grievances of an emergency nature.

(a) Definition. Emergency grievances shall be defined as matters regarding which disposition according to the regular time limits would (1) subject the inmate to a substantial risk of personal injury; (2) cause other serious and irreparable harm to the inmate; or (3) remove the attainability of the requested action.

If a grievance submitted as an emergency is ruled at any level not to be an emergency, it shall be returned to the grievant specifying that fact, with reasons. The response shall indicate that the grievability decision may be appealed to Level 3, and that the grievance may be re-submitted as a regular grievance.

(b) Procedure. Emergency grievances shall be forwarded immediately, without substantive review, to the level at which corrective action can be taken. It shall be the duty of the unit head or designee to determine to what level the grievance must be forwarded if substantive action must occur beyond the level of the unit head. It shall be the duty of all correctional employees to forward the emergency grievance in expedited fashion to the appropriate level within the institution.

Like other grievances, emergency grievances normally shall be appealable to Level 3. If substantive action is required beyond Level 2, no appeal shall be permitted beyond the level of substantive action.

4-14.8 (c) Time limits. Emergency grievances that may receive substantive action within the institution must receive a written response within eight (8) hours. Emergency grievances requiring a substantive response beyond the institution or appealed to Level 3 must receive a written response within five (5) working days and a telephone response in two (2) working days. Emergency grievances that will be mooted by the passage even of the time limits specified for emergency grievances must receive verbal or telephone responses prior to that time.

4-14.9 OPERATION. (a) Initiation. The procedure for initiating a grievance shall be simple and include the use of a standard form. Necessary materials shall be freely available (i.e., upon request) to all inmates at all waking hours and, if the grievant indicates a desire to file an emergency grievance, at all hours of the day and night. Assistance shall be readily available for inmates who cannot complete the forms themselves. Forms shall not demand unnecessary technical compliance with formal structure or detail, but shall encourage a simple and straightforward statement of the inmate's problem and requested resolution. (See Attachment #3 for example.)

(b) Review. The grievant may request review or appeal at any level that it is available as defined by this policy. Any request for review shall be allowed automatically without interference and shall be conducted without influence or interference by administrators or employees of the institution.

4-14.10 RECORDS. (a) Nature. Records regarding the filing and disposition of grievances shall be collected and maintained systematically by the institution. Such records shall include:

(1) a log showing the name and number of the grievant, dates of initial submission and of response at each level, type of problem grieved, and level of resolution;

(2) a completed data form for each resolved grievance that is filled out at the unit and forwarded to the Regional Office on a monthly basis.

(b) Record Retention. Copies of each completed grievance shall be maintained at the unit for a minimum of three years.

(c) Record Location. No copies of grievances or adverse reference to any grievance shall be placed in an inmate's official unit or central file.

4-14.10 (d) Confidentiality. Records regarding the participation of an individual in grievance proceedings shall not be available to employees or other inmates, except to the extent that access for clerical processing of records is necessary, and that employees who are participating in the disposition of a grievance shall have access to records essential to the resolution of the grievance.

4-14.11 MONITORING AND EVALUATION. (a) Unit grievance procedures shall be monitored regularly by Regional Grievance Coordinators, through personal visits, records and computer printout reviews, and questionnaires.

(b) An annual evaluation of the grievance procedure shall be conducted by the Division of Program Development and Evaluation.

(c) Each correctional institution shall conduct its own internal evaluation of its grievance procedure prior to the annual evaluation. Inmates and employees shall be afforded an advisory role in this evaluation, which shall include a review of both the effectiveness and the credibility of the grievance procedure.

4-14.12 REFERENCES.

American Correctional Association and Commission on Accreditation for Corrections, Standards:

2-4343 (Adult Correctional Institutions)

Virginia Department of Corrections, Division of Adult Services Guidelines:

846	3-13-77	Inmate Grievance Procedure
861	11-29-77	Inmate Discipline

Public Law 96-247, 94 Stat. 349 (42 U.S.C. 1997) Civil Rights of Institutionalized Persons Act, 1980.

Minimum Standards for Inmate Grievance Procedures (promulgated under P.L: 96-247) Federal Register Document 81-28587 Filed 9-30-81 dated September 25, 1981, U. S. Attorney General W. F. Smith.

R. K. Procunier
Director of Corrections

VISION OF ADULT SERVICES GUIDELINE

COMMONWEALTH OF VIRGINIA

DEPARTMENT OF CORRECTIONS

GUIDELINE NUMBER	DATE
846	March 31, 1977

SUBJECT

INMATE GRIEVANCE PROCEDURE

I. PURPOSE

An inmate grievance procedure is hereby established to provide inmates with an administrative method for the settlement of grievances they have relating to their imprisonment. A grievance is a formal complaint concerning an incident, policies, or conditions within individual institutions or within the Division. This grievance procedure has two broad objectives: 1) to give inmates a regularly available channel for the expression of their grievances, and 2) to foster prompt solutions to institutional problems in a regulated, orderly fashion.

It is expected that most grievances can be resolved more quickly to the benefit of all concerned by use of this guideline, which provides for direct contact with the staff responsible in the particular area of a specific grievance. Prompt attention to an inmate complaint by the staff at each institution will insure that each complaint will receive complete and immediate response, thereby contributing to the furtherance of better inmate-staff communication.

II. ADMINISTRATIVE PROCEDURE

Grievance and Appeal forms will be made available, in duplicate, to every inmate upon request. A copy of the form to be used in grievance procedures is attached to this guideline. To begin a complaint, an inmate must fill out and submit a grievance and appeal form within a reasonable time after any incident which given rise to a grievance. If the complaint involves a continuing policy or condition of the institution or Division, the grievance and appeal form may be filled out and submitted at any time. The inmate should keep one copy for his reference. The narrative of the complaint should contain a complete and specific account of the inmate's complaint, including the names of the people involved, date and location of the incident or condition complained of, and the remedy the inmate seeks. The grievance and appeal form will then be placed in a sealed envelop and submitted to the staff member responsible for the first step in this grievance procedure.

Proper Channels for Submissions of Grievances

a. The inmate shall submit his grievance to the Superintendent, or Officer-in-Charge of the Institution or Field Unit to which he is assigned. The Superintendent or the Officer-in-Charge of the institution or field unit to which the inmate is assigned, or in their absence, a designee, will have

eight (8) calendar days within which to respond to the complaining inmate on the answer section of the grievance and appeal form.

b. The Superintendent or his designee will have the responsibility of interviewing the inmate, determining the nature of the inmate complaint, and investigating the complaint (to include a hearing when necessary). In arriving at his decision, the Superintendent may designate an uninvolved individual to be responsible for gathering any information, conducting an investigation or holding a hearing in order to provide the Superintendent with the necessary facts upon which to base an acceptable, objective decision in each individual's case.

c. If the decision is contrary to the remedy the inmate seeks, he will be informed of his right to appeal. If the inmate does object to the Superintendent's decision and desires to appeal to a higher authority, the inmate must so indicate by signing the objection and appeal statement located on the Grievance and Appeal form immediately below the space provided for the Superintendent's response. Once the inmate has noted his objection to the decision and his desire to appeal it, a copy of the Superintendent's decision will then be forwarded automatically to the Deputy Director of Adult Services, who is charged with the authority and responsibility for making the final determination in all cases where the complaining inmate has appealed the Superintendent's decision. The Deputy Director shall respond for the Director of Adult Services as his designee and his response shall constitute the final determination in the appeal process.

d. A copy of any grievance submitted to the Officer-in-Charge of a correctional field unit will also be sent, but only for reference purposes, to the Superintendent of the Region. The Superintendent of the Region will not act on these grievances but will be furnished with a copy of each grievance so that he might be kept informed as to the nature of inmate complaints and institutional responses from those units under his supervision.

e. The Superintendent will have the necessary authority to resolve inmate complaints filed pursuant to this Guideline. The dated response of the Superintendent will indicate what action has been taken and briefly state the reasons for his disposition of the case. Two copies of the Superintendent's response shall be given to the complaining inmate.

Appeal of Superintendent's Decision: Deputy Director's Action.

a. Once the Superintendent has submitted his decision to the Deputy Director, the Deputy Director will have fifteen (15) calendar days within which to reach a decision. In arriving at his decision, the Deputy Director may interview the inmate,

determine the continuing nature of the complaint, and investigate the complaint (to include a hearing when necessary). The Deputy Director will indicate his decision and the reasons for such decision in writing to both the Superintendent of the Institution or Officer-in-Charge of the respective Field Unit and the complaining inmate. Again, the decision of the Deputy Director will be final in all respects to the grievance.

b. In the event more time is required to conduct a hearing or a more formal investigation, the Deputy Director, or his designee may extend the time for good cause shown; however, the total time from initial submission of the grievance, until final action by the Deputy Director will not exceed thirty (30) days.

c. In the event a hearing or an investigation is conducted, the grievance form will show that witnesses were interviewed and a brief summary of their testimony.

d. No action will be taken against any inmate as a result of his using the grievance procedures established herein.

III. GENERAL

a. The grievance and appeal form is to be completed by the inmate, sealed in an envelope and delivered to the Superintendent, or designated Officer-in-Charge, who is responsible for the initial investigation and appropriate action of the complaint.

b. The inmate will be provided with a receipt when he submits his complaint to the responsible staff member. Attached is a copy of the receipt form to be used in this grievance procedure. One copy of the receipt will be given to the inmate and one copy will be forwarded with his complaint through the entire grievance procedure.

c. A completed copy of the grievance and appeal form, to include the final decision will be filed in the inmate's record folder at the Central Records Office, and at the institution and/or field unit where he is assigned.

d. Time computation under this guideline will be that the day of receipt of an inmate grievance form will be counted as the first day of the required answering time. Weekends are included. Prompt attention to each complaint will be the rule under this guideline.

e. The complaining inmate will be informed of his right to appeal to the next higher step in the procedure if he is dissatisfied with the decision at a lower level. Once the complaining inmate notes an appeal, a copy of the decision rendered by the staff member will automatically be forwarded to the next step in this procedure. Each staff member

involved in this procedure is responsible for insuring that all applicable documentation is forwarded to the proper staff member in the next higher step of this procedure when the complaining inmate notes an appeal.

f. The Deputy Director in this grievance procedure will not act upon a grievance until a staff member in the lower level of this procedure has acted on the grievance of the inmate, noted that action taken and an appeal has been noted.

IV. SUPERSESSION

This guideline supersedes Division Guideline No. 846, "Inmate Grievance Procedure" dated November 1, 1974.

Robert M. Landon
Director
Division of Adult Services

GRIEVANCE AND APPEAL FORM

(Refer to Guideline #846 for Procedures)

NAME (last, first, m.i.)	NUMBER	INSTITUTION	LIVING UNIT

PART I: INMATE'S STATEMENT

What is your complaint?

What action do you want?

Signature: _____ Date: _____

PART II: SUPERINTENDENT'S RESPONSE

(To be completed and returned within 8 calendar days)

Signature: _____ Date: _____

PART III: INMATE'S APPEAL

I am not satisfied with the Superintendent's response because:

Signature: _____ Date: _____

PART IV: DEPARTMENT'S RESPONSE
(To be completed and returned within 15 calendar days)

A. Ombudsman's Report (Optional)

Signature: _____ Date: _____

B. Regional Administrator's Response

Signature: _____ Date: _____

Office of the Attorney General
Washington, D. C. 20530

December 14, 1982

R. K. Procunier
Director
Department of Corrections
Commonwealth of Virginia
P.O. Box 26963
Richmond, Virginia 23261-693

Dear Mr. Procunier:

We have reviewed the November 12, 1982 resubmission of Virginia's application for certification of its inmate grievance procedure. It is my pleasure to inform you that the Virginia procedure is in substantial compliance with the Standards.

Accordingly, pursuant to authority conferred by Title 42, United States Code, Section 1997(e) and Part 40 of Title 28, Code of Federal Regulations, I hereby certify that the Virginia Department of Corrections Inmate Grievance Procedure submitted for our review on November 12, 1982 is in substantial compliance with the Standards set forth in Part 40 of Title 28, Code of Federal Regulations. Since the Virginia procedure has been in effect for less than a year, this certification is conditional as defined in the Standards. This certification is effective for one year from the date of this letter or until full certification is granted, whichever period is shorter. Full certification may be granted when the procedure is found to be in substantial compliance with the Standards and has been in effect for more than a year.

I congratulate you and your staff for developing the first inmate grievance procedure to be certified under the Standards.

Sincerely,

William French Smith
Attorney General

Office - Supreme Court, U.S.
FILED
AUG 12 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 82-1630 and 82-6695

In The

Supreme Court of the United States

October Term, 1983

TED S. HUDSON,

Petitioner,

v.

RUSSELL THOMAS PALMER, JR.,

Respondent.

and

RUSSELL T. PALMER, JR.,

Petitioner,

v.

TED S. HUDSON

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED IN NO. 82-1630 APRIL 5, 1983
PETITION FOR CERTIORARI FILED IN NO. 82-6695 MAY 4, 1983
CERTIORARI GRANTED JUNE 27, 1983

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In The

Supreme Court of the United States

October Term, 1983

Nos. 82-1630 and 82-6695

TED S. HUDSON,

Petitioner,

v.

RUSSELL THOMAS PALMER, JR.,

Respondent.

and

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Petitioner,

v.

TED S. HUDSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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APPENDIX

OPINIONS AND ORDERS OF COURTS BELOW

The Opinion and Order of the District Court entered on November 17, 1981 are not reported but are reproduced herein as well as in the Appendix to the Petition for a Writ of Certiorari. The Opinion of the United States Court of Appeals for the Fourth Circuit, issued January 6, 1983, is reported at *Palmer* v. *Hudson*, 697 F.2d 1220 (4th Cir. 1983), and a copy is contained herein and in the Appendix to the Certiorari Petition.

DOCKET ENTRIES IN THE UNITED STATES DISTRICT COURT

September 28, 1981—Entered Order allowing petitioner to file in forma pauperis and directing respondent to answer within 20 days. CIV. O. B. #73, p. 95. Copies as directed.

September 28, 1981—Petition filed.

October 19, 1981—Motion for Summary Judgment & Affidavits.

October 19, 1981—Clerk's Notice.

November 12, 1981—Petitioner's Motion Against Summary Judgment and request for Relief.

November 18, 1981—Memorandum Opinion

November 18, 1981—Order entered that defendant's motion for summary judgment is granted and this case is stricken from the docket. CIV. O. B. #74, p. 72. Copies to counsel & petitioner.

January 23, 1981—Notice of Appeal.

February 1, 1981—Mailed Record to Fourth Circuit of Appeals.

DOCKET ENTRIES IN THE FOURTH CIRCUIT COURT OF APPEALS

December 4, 1981—Case docketed ROA filed 12/04/81.

December 4, 1981—INFORMAL BRIEFING Letter mailed.

December 4, 1981—CASE SUBMITTED TO SLCO.

December 14, 1981—Appellant's informal brief filed.

December 28, 1981—CF and DS sent to Clerk's Office for abeyance order.

December 29, 1981—ORDER Holding case in abeyance pending this court's decision in *Bradley* v. *Kidd*, No. 80-6618, filed. Copy to Palmer and Katz.

January 29, 1982—Record, copy of brief, suggested per curiam and copy of district court order transmitted to Judges Phillips, Ervin and Murnaghan.

April 5, 1982—Record, d/s, and c/f submitted to Clerk's Office to be set down for argument per Judge Phillips.

April 6, 1982—ORDER assigning counsel for A, filed.

April 13, 1982—BRIEFING ORDER, filed. A due 05/24/82.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA,
continued and held at Abingdon, in and for said district,
on the 28th day of September, 1981.

RUSSELL THOMAS PALMER, JR.

v.

TED S. HUDSON, Officer, Bland Correctional Center

Civil Action No.: 81-0290-A

Upon consideration of plaintiff's application to proceed *in forma pauperis*, his proof of poverty and the complaint annexed, it is ORDERED that:

1. The complaint be filed *in forma pauperis*;

2. The defendants file their responsive pleading within 20 days of the receipt of this order;

3. The plaintiff is referred to Rule 5 of the Federal Rules of Civil Procedure which requires that every pleading after the complaint and every written motion, notice, and similar paper be served on all parties, which service shall be made by mailing it to the parties' attorney;

4. The plaintiff is hereby granted 15 days from receipt of a copy of the defendants' answer and other responsive pleadings within which to file opposing affidavits or other appropriate material, if he be so advised. Failure to so respond may result in the entry of judgment against plaintiff on the basis of defendants' responsive pleading.

5. Defendants are requested to notify the Court immediately upon the transfer or release of plaintiff, and to provide his new address, if known.

Service shall be made upon Deputy Attorney General, Criminal Division, 900 Fidelity Bldg., 830 E. Main St., Richmond, VA 23219 by mailing a copy of the order with

the complaint attached. A copy of this order shall also be sent to the plaintiff and to the Director, Bureau of Records, Virginia State Penitentiary, Richmond, VA 23219.

/s/ JAMES C. TURK
United States District Judge

FORM TO BE USED BY PRISONERS IN FILING A COMPLAINT UNDER CIVIL RIGHTS ACT 42 U.S.C. S 1983

Name: RUSSELL THOMAS PALMER, JR.
Prisoner Number: 101040
Place of Confinement: Bland Correctional Center

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

COMPLAINT

RUSSELL THOMAS PALMER, Jr.

Plaintiff,

v.

TED S. HUDSON #2378,
Officer at Bland Correctional Center.

Defendant.

Case Number: 81-0290-A
(To be supplied by Clerk, U. S. District Court)

A. Have you begun other actions in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment? YES: ☒ NO: ☐

B. If your answer to "A" is yes, describe the action in the spaces below: If more than one action, describe the additional actions on reverse side of page.

1. Parties to the action: Palmer vs. State Corr. Dept. of Va. et al
2. Court (if Federal court, name the district; if a state court, name the City or County: Roanoke Co. Circuit Court, Botetourt Co. Circuit Court, U.S. District Court-Western District of Va.
3. Docket Number: N/A.

4. Name of Judge to whom case was assigned: Judge Koozze, Judge Byrd, Judge Turk.
5. Disposition (for example: Is the case still pending? If not what was the ruling? If so, what was the disposition?:) Pending

Did you present the facts relating to your complaint in the state prison grievance procedure? YES: ☐ NO: ☒

1. If your answer is no, what was the result? It would serve no purpose, only slow the wheels of justice.
2. If your answer is yes, explain: _____

D. STATEMENT OF CLAIM

State here briefly the facts of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates and places. *DO NOT* give any legal arguments or cite any cases or statutes. If you intend to allege a number of different claims, number and set forth each claim in a separate paragraph. Use as much space as you need, attach extra pages if it is necessary.

CLAIM #1

Supporting *facts* (Tell your story briefly without citing cases of Law: On 9-16-81 around 5:50 p.m., officer Hudson shook down my locker and destroyed a lot of my property, i.e.: legal materials, letters, and other personal property only as a means of harassment. Officer Hudson has violated my Constitutional Rights. The shakedown was no routine shakedown. It was planned and carried out only as

harassment. Hudson stated the next time he would really mess my stuff up. I have plenty witnesses to these facts.

State what relief you seek from the Court. Make no legal arguments; cite no cases or statutes:

CLAIM #2

On 9-17-81 around 10 p.m., Officer Hudson again harassed me trying to force me into saying something smart to him or going off on him. I refused to do so. Therefore Officer Hudson had some type of false charge placed against me stating he found a pillow case cover in a trash bag which he believes is mine.

Relief: I request Officer Hudson to be removed as a correctional officer at Bland Farm because he is incompetent and his job has gone to his head.

Signed this 17th day of Sept., 1981.

/s/ RUSSELL T. PALMER, JR.
Plaintiff or Plaintiffs

CERTIFICATION

STATE OF VIRGINIA
CITY/COUNTY OF: BLAND

Russell T. Palmer, Jr., being first duly sworn, under oath, says: That he is the plaintiff in this action and knows the content of the above complaint; That it is true of his own knowledge, except as to those matters that are stated in it on his information and belief, and as to those matters he believes them to be true.

/s/ RUSSELL T. PALMER, JR.
Signature of Affiant-Plaintiff

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: September 17, 1981.

/s/ RUSSELL T. PALMER, JR.
Signature

FORMA PAUPERIS AFFIDAVIT

I hereby apply for leave to proceed with this complaint without prepayment of fees or costs, or giving security therefore, in support of my application, I state under oath that the following facts are true:

(1) I am the plaintiff in said complaint, and I believe that I am entitled to redress.

(2) I am unable to prepay the costs of said action, or give security therefore, because: I am an inmate at Bland Correctional Center.

(Write "None" above if you have nothing; otherwise list your assets.)

/s/ RUSSELL T. PALMER, JR.
Signature of Plaintiff
(Sign here *only* if you seek to proceed without prepayment of fees and costs)

STATE OF VIRGINIA
CITY/COUNTY OF: BLAND

Russell T. Palmer, Jr., being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and is correct.

/s/ RUSSELL T. PALMER, JR.
Signature of Plaintiff
(Required as to each plaintiff)

I declare under penalty of perjury, that the foregoing is true and correct.

Executed on: September 17, 1981.

/s/ RUSSELL T. PALMER, JR.
Signature

CERTIFICATE

I hereby certify that the plaintiff herein has the sum of $25 on account to his credit at the penal institution where he is confined. I further certify that the plaintiff likewise has the following securities to his credit according to the records of said penal institution: None

REFUSED TO SIGN
AUTHORIZED OFFICERS OF PENAL INSTITUTION
/s/ RUSSELL T. PALMER, JR.

Russell T. Palmer, Jr.
B.C.C. Rt. 2, #101040
Bland, Va. 24315

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ABINGDON DIVISION

RUSSELL THOMAS PALMER, JR.,

Plaintiff,

v.

TED S. HUDSON, etc.,

Defendant.

Civil Action No. 81-0290-A

MOTION FOR SUMMARY JUDGMENT

Now comes the defendant, by counsel, pursuant to Rule 56, Federal Rules of Civil Procedure, and moves this Honorable Court for summary judgment herein as follows:

1. Defendant submits that plaintiff alleges, in substance, that he has been harassed and certain of his personal property destroyed by the defendant.

2. Defendant submits as Exhibit I, his affidavit, with an Enclosure, and respectfully requests the Court to accept the same as evidence in support of this motion.

3. Defendant submits that on September 16, 1981, defendant was conducting a routine shakedown searching for contraband. During the course of the search, defendant found plaintiff's trash can contained a plastic pillow cover which had been sliced open and the cotton contents removed. This pillow cover was confiscated and plaintiff was charged with destroying state property. (See Exhibit I, Enclosure A). An Adjustment Committee hearing was held on September 24, 1981, and plaintiff was found guilty of the charge. (See Exhibit I).

4. Defendant denies that the shakedown was planned or carried out as a form of harassment and, further, denies that any of plaintiff's possessions were destroyed in the process of the search. (See Exhibit I).

5. Defendant submits that some deprivations of property are concomitants of prison life. *Pritchard* v. *Perry*, 508 F.2d 423 (4th Cir. 1975). Additionally, it is submitted that the confiscation of contraband does not impose upon the plaintiff any deprivation which goes beyond the reasonable limits of prison administration. *Pritchard* v. *Perry*, *supra*. Defendant submits, additionally, that subjecting the plaintiff to periodic shakedown searches does not violate any of his constitutional rights where the purpose of such a shakedown is to find contraband such as in the instant case. *Jones* v. *North Carolina Prisoners' Union*, 433 U.S. 119 (1977).

6. Defendant notes that the plaintiff fails to allege any previous altercations between plaintiff and defendant so as to give some factual basis to his allegation of harassment by the defendant in conducting a shakedown of his cell. Defendant submits, consequently, that plaintiff's allegation must fall of its own weight.

7. Defendant denies each and every allegation not expressly admitted herein.

8. Defendant requests to be allowed to file his answer upon any adverse determination by the Court upon this motion.

WHEREFORE, for the reasons stated above, defendant requests he be granted summary judgment herein.

Respectfully submitted,
TED S. HUDSON, etc.
By _____
Counsel

Alan Katz
Assistant Attorney General
Post Office Box 26963
Richmond, Virginia 23261

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of October, 1981, a true copy of the foregoing Motion for Summary Judgment was mailed to Russell Thomas Palmer, Jr., Bland Correctional Center, Route 2, Bland, Virginia 24315.

ALAN KATZ
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ABINGDON DIVISION

RUSSELL THOMAS PALMER, JR.,

Plaintiff,

v.

TED S. HUDSON, etc.

Defendant.

Civil Action No. 81-0290-A

AFFIDAVIT

State of Virginia, County of Bland, to-wit:

T. S. HUDSON, first being duly sworn, states as follows:

1. I am a Correctional Officer at Bland Correctional Center.

2. I base the information contained in this affidavit on personal knowledge and records kept in the regular and ordinary course of business.

3. On September 16, 1981, Officer T. R. Lephew and I were conducting a routine shakedown of inmate Russell Palmer's (#101040) locker. The shakedown was not planned or carried out for harassment purposes; it was merely a routine search for contraband. Both Officer Lephew and I were careful with Palmer's possessions and I emphatically deny that any of his possessions were destroyed or torn. In fact, I remember stating in Palmer's presence to Officer Lephew that we should be careful with Palmer's possessions and try not to make a mess while we were searching his locker. During the search, I found Palmer's trash can contained a plastic pillow cover which had

been sliced open and the cotton contents had been removed. I then found the cotton contents stuffed in Palmer's pillow case on his bed. The plastic pillow cover was confiscated and since it was State property, I placed a Category B, Number 11, major institutional charge for "Destroying, altering, or damaging State property." A copy of this charge is stated on the Adjustment Committee Report Form, a copy of which is attached hereto as Enclosure A.

As noted on the Adjustment Committee report, Palmer was advised of his rights regarding the charge and a copy of the charge was served on Palmer the following day, September 17, 1981. Thereafter, when the Adjustment Committee convened on September 24, 1981, Palmer was found guilty of the charge based on my testimony as the reporting officer. As noted on page two of the report, the committee recommended a penalty of a reprimand be reduced to writing and placed in Palmer's record, and additionally, that Palmer make restitution for the destroyed cover.

4. I never told inmate Palmer that I would really mess up his locker in the future. I have never made up or placed false charges against him, nor have I acted in a manner which I would consider as harassment towards him.

T. S. HUDSON
/s/ T. S. HUDSON
Affiant

Sworn and subscribed to before me, a Notary Public, in and for the State of Virginia, County of Bland, on this 9th day of October, 1981.

/s/ SANDRA S. WILEY
Notary Public
My Commission Expires
February 5, 1985

DIVISION OF ADULT SERVICES,
DEPARTMENT OF CORRECTIONS
ADJUSTMENT COMMITTEE REPORT FORM

Name: Russell Palmer. Number: 101040. Institution: Bland Corr. Center. Quarters: 2-4.
Offense: Destroying, altering or damaging State property.
Title: _____ Date: September 16, 1981.
Category: B. Number: 11. Location: 2-4. Time: 5:50 p.m.

I, Officer T. S. Hudson, was working dorm 2-4 on the above date and time when Officer Lephew and I were conducting a routine shakedown of Inmate Palmer's, #101040, locker and possessions. I found in Palmer's trash can a plastic pillow cover which had been sliced open and the cotton contents removed. Upon further checking Palmer's pillow that he was using had the contents that belonged inside the pillow cover. The cover was confiscated and held as evidence. No further action taken at this time.

Witness: T. R. Lephew
Reporting Officer's signature: T. S. Hudson
Reporting Officer: T. S. Hudson
Pre-hearing detention: YES / NO If Yes, explain how inmate presents danger to persons or property: _____

_____

Date released: _____

Advisement of Rights:

You are hereby informed that your signature below is not an admission of guilt. By signing below, the inmate indicates his/her preference regarding the rights indicated.

1. Attorney requested, Yes By phone DEK
If yes, attorney's name and date contacted: _____
Palmer stated he did not figure he needed an attorney.
2. Inmate or staff advisor requested, No DEK
If yes, staff members name or inmate's name and number:
_____
3. Voluntary witnesses requested, Yes DEK
If yes, list names and numbers: Will give names later.
4. Date set for hearing: September 24, 1981.
5. The reporting officer will be present at the hearing.

I have been informed of the charges against me and advised of my rights at the Adjustment Committee hearing.
Witness: E. E. White. Inmate's Signature: R. Palmer.
Witness: D. E. Keyley. Inmate Provided copy of report — Date: September 17, 1981. Time: 10:00 p.m.

Officer in charge, signature: J. D. Gusler.
Officer in charge: J. D. Gusler, Captain.
Palmer, Russell #101040
Continuance yes/no
Date of Continuance _____
Reason for continuance/Miscellaneous Remarks _____
_____
Revised Hearing Date _____

Adjustment Committee Hearing

Tape No. 934, Time 3:04 P.M., Date 9-24-81.
Plea ____ Guilty/Not Guilty: Deny.
Inmate Signature: Russell T. Palmer, Jr.
Decision of Committee: Guilty.
Reason for Decision: Decision based on report by officer Hudson that a destroyed pillow cover was found in a trash bag in Palmer's area of responsibility. Upon checking Palm-

er's pillow, on his bed was a pillow case only. Inside the pillow case was the part taken from a pillow cover. There was no other pillow on Palmer's bed. Palmer presented a pillow and cover, stated they were his and he had destroyed nothing.

Penalty: Recommend, Reprimand, reduced to writing and entered in inmates record. Also Palmer is to make restitution for the destroyed cover.

Suspension Recommendations: Yes/No _____

Chairman, Signature H. E. Thompson.

Member: Peggy H. Sutphin.

Member: N. A. McPeak.

This is to certify that I have received a copy of this report and have been informed of my right to request that the Director, Division of Adult Services review this decision.

Inmate Signature: Russell T. Palmer, Jr.

Admitted to Isolation _____

Date IN _____ Weight In _____

Date OUT _____ Weight Out _____

Assistant Warden Action _____ Approved (☒)/

Disapproved _____ L. K. Hardy

Comments _____

Date September 25, 1981

Associate Director BCFU/Major Institutions:

Approved/Disapproved _____

Comments _____

Date _____

Received by Division of Adult Services _____

Approved/Disapproved _____

Comments _____

Date _____

DAS-10A

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
WESTERN DISTRICT OF VIRGINIA

JOYCE F. WITT, Clerk

RUSSELL THOMAS PALMER, JR.

v.

TED S. HUDSON, Officer

Civil Action No. 81-0290-A

This case is before the court pursuant to defendant's motion for summary judgment which is supported by affidavits and copies of plaintiff's records. Before ruling on this motion the Court will give plaintiff 15 days from the date of this Notice to submit counter-affidavits or other relevant evidence contradicting, explaining or avoiding defendant's evidence. Failure of plaintiff to so respond may, if appropriate, result in summary judgment being granted for defendant.

Issued and mailed this 19th day of October, 1981.

JOYCE F. WITT, *Clerk*
U. S. District Court
By: D. SLEMP
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ABINGDON DIVISION

RUSSELL T. PALMER, JR.,

Plaintiff,

v.

TED S. HUDSON,

Defendant.

Civil Action No.: 81-0290-A

MOTION AGAINST SUMMARY JUDGMENT AND REQUEST FOR RELIEF

Comes Now Plaintiff Russell T. Palmer, Jr. #101040 in response to defendant's, by counsel, motion for summary judgment dated Oct. 16, 1981, and the affidavit of Ted S. Hudson dated Oct. 9, 1981.

1. All of Plaintiff's allegations are true to the best of his knowledge.

2. Plaintiff submits affidavits as Exhibits I and II with enclosures and respectfully requests this Honorable Court to accept the same as evidence in support of this motion.

3. Plaintiff knows and believes that the shakedown of Sept. 16, 1981 was not a routine shakedown, but only a form of harassment by officer Ted S. Hudson. Plaintiff does not nor has ever had a trash can, personal trash cans are not allowed in dorm 2-4 where plaintiff lives. Plaintiff has in his possession now the pillow with its green plastic cover he was issued upon his arrival at Bland Correctional Center on Aug. 11, 1981. The pillow cover confiscated, which was found in a dorm trash bag is not plaintiff's, since

plaintiff still has his original pillow which he presented at institutional adjustment hearing on Sept. 24, 1981, but committee did not accept or pay any attention to plaintiff's proof of his innocence, but sided with their fellow officer and found plaintiff guilty knowing he was/is *not guilty* of the charge.

4. Plaintiff again states the shakedown was only a form of harassment by Ted S. Hudson. Plaintiff Palmer also again states some of his personal property was intentionally destroyed by Ted S. Hudson.

5. Plaintiff states that *no* deprivations of legal work and legal materials should be concomitants of prison life. *No contraband* belonging to plaintiff Palmer was confiscated by Ted S. Hudson on Sept. 16, 1981. This is not a case concerning contraband. Defendant's counsel is trying to Gerrymander the facts. Plaintiff realizes that routine shakedowns are necessary to properly run a prison, but he also knows they should not be used as harassment and retaliation.

6. Plaintiff has had several "run-ins" with Ted S. Hudson, the lone named defendant in this case. Plaintiff did state Ted S. Hudson had shook him down many times as harassment. Defendant Hudson has also had plaintiff Palmer called over to the office late at night only as harassment and an attempt to "get" him. Plaintiff does not live in a cell, as defendant's motion seems to state. Plaintiff lives in a dorm.

7. The affidavit of Ted S. Hudson is not correct. He has made false statements, but this is not unusual for him. Ted S. Hudson has wrote lots of false charges against inmates here at Bland, in his attempt to show everyone he is "bad." Ted S. Hudson went beyond his line of duty as a correctional officer, therefore he should *not* be represented by the

Virginia Assistant Attorney General. Plaintiff is attacking Ted S. Hudson, not the Virginia Dept. of Corrections.

8. Plaintiff states all his allegations are true to the best of his knowledge and belief. Plaintiff also states that defendant is only trying to stop justice from being done in this case.

9. Plaintiff requests that defendants *not* be allowed to slow the process of justice by being allowed to file any more motions.

Wherefore, for the reasons stated and the reasons in original complaint, plaintiff requests this Honorable Court rule in his favor and:

(A) order officer Hudson removed from his duty as a correctional officer.

(B) order the Virginia Dept. of Corrections to better train their prison guards and staff.

(C) grant any additional relief and monetary damages this Court deems fit.

Dated: Oct. 19, 1981.

Respectfully submitted,
RUSSELL T. PALMER, JR.
Russell T. Palmer, Jr.
B.C.C. Rt. 2, #101040
Bland, Va. 24315-9616

I hereby certify a copy of this Motion Against Summary Judgment and request for Relief was sent to Mr. Alan Katz, Asst. Attorney General, Richmond, Va. on this date, October 19, 1981.

RUSSELL T. PALMER, JR.

EXHIBIT #1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ABINGDON DIVISION

RUSSELL T. PALMER, JR.,

Plaintiff,

v.

TED S. HUDSON,

Defendant.

Civil Action No. 81-0290-A

AFFIDAVIT

State of Virginia, County of Bland,

Richard A. Daughtrey, first being duly sworn, states the following:

On September 16, 1981 around 5:50 p.m. I Richard Daughtrey did witness a shakedown and ransacking of property belonging to inmate Russell T. Palmer, Jr. in the hope of finding contraband. During this time, in fact, at the conclusion of the search a plastic pillow cover was discovered in a brown paper trash bag located between bunks eleven and twelve. Officer Hudson assumed it to be the property of inmate Palmer.

The assumption was incorrect and Mr. Palmer categorically denied it to be his. The aforementioned trash bag is used by any and all prisoners during television viewing; therefore, it is obvious that the pillow covering in question could have belonged to anyone and that the charge brought

against inmate Palmer for destruction of state property is a form of harassment rather than fact.

Dated: October 19, 1981

RICHARD A. DAUGHTREY
#124950

Bland Correctional Center
Rt. 2
Bland, Va. 24315-9616
Bldg. 2/4

App. 25

EXHIBIT #2

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ABINGDON DIVISION

RUSSELL T. PALMER, JR.,

Plaintiff,

v.

TED S. HUDSON,

Defendant.

Civil Action No. 81-0290-A

AFFIDAVIT

State of Virginia, County of Bland,

Paul T. Hussey, comes forth and states as follows:

that on Sept. 16, 1981 approximately 6 p.m. I, Paul T. Hussey was present and did observe the shakedown of property belonging to one Russell T. Palmer by Officer Ted S. Hudson and another guard. No contraband was found in what I can only describe as a ransacking rather than a proper search. Inmate Palmer was written up (destruction of state property) when a pillow case was discovered in a trash bag situated between bunks eleven and twelve. Since inmate Palmer's bed is located only 6' 9" from the t.v. set, it is common practice for several other inmates to use his area for seating. Furthermore, many inmates use that trash bag, since the only designated trash and litter recepticle is located at the opposite end of the *dormitory*. Moreover, I wish to point out that Mr. Hudson was merely knit-picking, since rarely do officers go to this extent. As I sit here now

typing this statement I bear witness to the fact that inmate Palmer does in fact have a pillow with pillowcase intact;

that upon the conclusion of the search, inmate Palmer voiced his objection to the mess that remained. I have, myself, been the recipient of a shakedown and felt no displeasure since the officer (Saunders) was both professional and considerate in performing his task. At any rate, as Officer Hudson passed by me he muttered something to the effect that next time he'd really make a mess.

This is my first arrest so naturally my only time in prison. And I hope that no reprisal or revenge will be sought against me for bringing these facts to the attention of this Honorable Court.

Dated: October 19, 1981

PAUL T. HUSSEY pro/se
Bland Corr. Center
Rt. 2
Bland, Va. 24315-9616
#124907

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF VIRGINIA

ABINGDON DIVISION

Civil Action No. 81-0290-A

RUSSELL T. PALMER, JR.,

Plaintiff,

---

v.

TED S. HUDSON,

Defendant.

ORDER

In accordance with the Memorandum Opinion entered this day, it is ADJUDGED and ORDERED that defendant motion for summary judgment be, and hereby is, granted and that this case be stricken from the docket of the court.

The Clerk of Court is directed to send certified copies of this Order to plaintiff and counsel of record for the defendant.

ENTER: This 17th day of November, 1981.

/s/ TED DALTON
U.S. District Judge

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF VIRGINIA

ABINGDON DIVISION

Civil Action No. 81-0290-A

RUSSELL T. PALMER, JR.,

Plaintiff,

---

v.

TED S. HUDSON,

Defendant.

BY: Ted Dalton
U.S. District Judge

MEMORANDUM OPINION

Russell T. Palmer, Jr., an inmate of the Bland Correctional Center, brings this action *pro se* under 42 U.S.C. § 1983 alleging that the defendant, Ted S. Hudson, an officer at Bland, has deprived him of his constitutional rights. He alleges that Hudson:

1) Destroyed certain of his non-contraband, personal property;

2) Brought a false charge against him before the prison disciplinary committee; and

3) Has engaged in a pattern of harassment against him, as evidenced by the first two allegations.

Defendant Hudson denies these allegations and has filed a motion for summary judgment accompanied by his affidavit. Advised of his right to respond, plaintiff has filed a further pleading, reiterating his claims, and affidavits from two of his fellow inmates supporting his version of the facts. As the factual allegations are now fully developed, the court finds it timely to adjudge the merits of defendant's motion for summary judgment. Although this case is replete with factual disputes, none is crucial to the application of the relevant law. Accordingly, as plaintiff has failed as a matter of law to state a claim cognizable under § 1983, the defendant's motion for summary judgment will be granted.

The essential facts underlying this dispute are as follows: On September 16, 1981, defendant Hudson conducted a shakedown of plaintiff's locker, in the course of which plaintiff claims that Hudson, apart from leaving his locker in disarray, destroyed certain personal, non-contraband property. During the shakedown, Hudson discovered in a trash can near plaintiff's bunk a pillow case that had been ripped open and the cotton contents removed. Hudson then placed a charge against plaintiff of "destroying, altering or damaging State property". A hearing was held on this charge on September 24, 1981 and plaintiff was found guilty. A written reprimand was entered in his inmate record and he was ordered to make restitution for the cost of the pillowcase.

Plaintiff claims that Hudson's action in destroying his personal property has deprived him of property without due process of law in contravention of his fourteenth amendment rights. This issue has been recently addressed by the Supreme Court in *Parratt* v. *Taylor*, ... U.S. ...., 101 S.Ct. 1908 (1981). Under the holding in that case, this

court is forced to conclude that plaintiff has failed to state a claim of deprivation of property without due process of law such as would be cognizable in an action under § 1983. In *Parratt* a prisoner alleged that a prison official had negligently lost a certain item of his property. He sued under § 1983 for the value of the property, alleging that he had been deprived of property without due process of law. Initially, the Supreme Court noted that in any action under § 1983 two elements are essential: 1) action by a person acting under color of state law resulting in 2) a deprivation of rights, privileges, or immunities secured by the Constitution or laws of the United States. In *Parratt*, as in this case, the right claimed was the fourteenth amendment right not to be deprived of property "without due process of law". The Court held, however, that where the state provides the plaintiff with a remedy to redress his loss that satisfies the requirements of due process, then the plaintiff cannot be said to have been deprived of his property "without due process of law".

> "We may reasonably conclude, therefore, that the existence of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment."

Parratt v. *Taylor*, ... U.S. ...., ..., 101 S.Ct. 1908, 1916 (1981), *quoting from Bonner* v. *Coughlin*, 517 F.2d 1311, 1319 (7th Cir. 1975), *mod. en banc*, 545 F.2d 565 (1976), *cert. denied*, 435 U.S. 932 (1978). The Court in *Parratt* concluded that the existence of a state statutory tort remedy allowing inmates to recover against state officials for negligent loss of property satisfied the requirements

of due process. Similarly, the court in this case must conclude that the tort remedies available to the plaintiff in the Virginia courts, which plaintiff is advised to pursue to compensate for the loss he alleges has occurred, satisfies due process.

Plaintiff has alleged an intentional destruction of his property by defendant Hudson. Where the tort is intentional, the defendant employee of the state would enjoy no immunity under Virginia law. *Elder* v. *Holland*, 208 Va. 15, 155 S.E.2d 369 (1967). Accordingly, plaintiff may proceed against the defendant in state court either for conversion, *see generally* 19 *Michie's Jurisprudence*, "Trover and Conversion," § 4 (1977), or for detinue, *see* Va. Code §§ 8.01-144 *et seq.* (Repl. Vol. 1977). As these remedies provide plaintiff with a "meaningful opportunity subsequent to the initial taking for a determination of rights and liabilities," *Parratt, supra*, 101 S.Ct. at 1917, he has not alleged that he has been deprived of his property without due process of law. Therefore his allegation fails to state a claim cognizable under § 1983.

Plaintiff's second claim is that defendant Hudson brought a false charge against him before the prison's disciplinary committee. The affidavits of plaintiff's fellow inmates substantiate his claim that the prison disciplinary decision was wrong and that, at the very least, there was a substantial question whether the pillow cover found in the trash can near his bunk was in fact his. Nevertheless, it is now well-settled that federal courts do not sit as a further stage of appeal or a board of review to determine the accuracy of facts determined at a prison disciplinary hearing. *Flythe* v. *Davis*, 407 F. Supp. 137, 138 (W.D. Va. 1976). The role of this court is to determine, rather, that the prisoner was afforded the protections of procedural due process in his

adjustment committee hearing. *Russell* v. *Division of Corrections*, 392 F. Supp. 476, 477 (W.D. Va. 1975). In this case it appears that plaintiff was given full benefit of those procedures mandated by *Wolff* v. *McDonnell*, 418 U.S. 539 (1974). He was served with notice of the charges against him, was given an opportunity to seek advice from an attorney or an inmate or staff adviser, was present at the hearing and was afforded the opportunity of presenting witnesses and evidence on his behalf. These procedures, established pursuant to published guidelines of the Virginia Department of Corrections, fully comported with the requirements of *Wolff*. Indeed, plaintiff makes no allegation that they did not. He claims, however, that the hearing panel disregarded his clear proofs in favor of supporting a fellow officer's false charge. This claim, however, goes to the very merits of the charge which this court, in deference to the procedures established by the state, cannot review. Accordingly, this claim also fails to state a cause of action cognizable under § 1983.

Plaintiff's final claim is that he is being subjected to harassment on the part of defendant Hudson. He points to the two preceding allegations as supportive of this claim and also to numerous other shakedowns which he has experienced at the hands of Officer Hudson. Plaintiff also alleges that he was called into the office once late at night. While there is no doubt that in extreme cases of harassment and improper treatment a claim of cruel and unusual punishment proscribed by the sixth amendment may be stated, *see, e.g., Landman* v. *Royster*, 354 F. Supp. 1302 (E.D. Va. 1973), the court does not feel that the allegations made in this case, even if taken as true, rise to the level of a constitutional deprivation. It has long been recognized that courts "possess no expertise in the conduct and manage-

ment of correctional institutions". *Finney* v. *Arkansas Board of Corrections*, 505 F.2d 194, 200 (8th Cir. 1974).

> Courts are accordingly limited in their exercise of power in this area to deprivations which represent constitutional abuses and they cannot prohibit a given condition or treatment in prison management unless it reaches the level of an unconstitutional deprivation. It has been well said that "[C]ourts encounter numerous cases in which the acts or conditions under attack are clearly undesirable and are condemned by penologists, but the courts are powerless to act because the practices are not so abusive as to violate a constitutional right." Note, *Decency and Fairness: An Emerging Judicial Role in Prison Reform*, 72 *Va.L.Rev.* 841, 843 (1971).

Sweet v. *South Carolina Dep't of Corrections*, 529 F.2d 854, 859 (4th Cir. 1975). This court is willing to accept as true the plaintiff's allegations concerning "harassment" by defendant Hudson. As the court has already noted, however, Virginia state law provides plaintiff an adequate forum to pursue his claim that Hudson has intentionally destroyed his personal property. Concerning the "false charge" lodged against him by Hudson, the court is powerless to review the merits of this claim, as explained above. Finally, this court stands ready to correct any abuse of plaintiff that rises to the level of a deprivation of a constitutional right. But the allegations of "harassment" contained in this complaint simply do not, singly or in the aggregate, amount to a matter of constitutional significance. Accordingly, the court finds that plaintiff, in this regard also, has failed to state a claim under § 1983.

For the reasons set forth above, defendant's motion for

summary judgment is granted. An appropriate order will be entered.

ENTER: This 17 day of November, 1981.

/s/ TED DALTON

Ted Dalton
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ABINGDON

RUSSELL T. PALMER, JR.,

Plaintiff,

v.

TED S. HUDSON,

Defendant.

Civil Action No.: 81-0290-A

NOTICE OF APPEAL

Comes Now plaintiff Russell T. Palmer, Jr. who hereby appeals to the United States Court of Appeals for the Fourth Circuit the order dated November 17, 1981 concerning the above case.

It is clear to see that plaintiff was found guilty of a false charge. Plaintiff cannot understand why the Dept. of Corr. is able to get away with their unlawfulness and wrongdoings.

Therefore, plaintiff files this appeal to seek justice.

Dated: Nov. 19th, 1981

Respectfully submitted,
RUSSELL T. PALMER, JR.
Russell T. Palmer, Jr.
B.C.C. Rt. 2, #101040
Bland, Va. 24315-9616

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-6967

RUSSELL THOMAS PALMER, JR.

Appellant,

v.

TED S. HUDSON, Officer,

Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Abingdon. Ted Dalton, Senior District Judge.

Argued October 5, 1982 Decided January 6, 1983

Before WINTER, Chief Judge, PHILLIPS and MURNAGHAN, Circuit Judges.

Deborah C. Wyatt (Wyatt & Rosenfield on brief) for Appellant; Alan Katz, Assistant Attorney General (Gerald L. Baliles, Attorney General of Virginia on brief) for the Appellee.

WINTER, Chief Judge.

Russell T. Palmer, Jr., an inmate of the Bland Correctional Center in Virginia, brought this § 1983 action against Ted S. Hudson, an officer of that facility, alleging, among other things, that Officer Hudson destroyed his property, in a non-routine shakedown search.[1] The district court granted defendant's motion for summary judgment, reasoning that under Parratt v. Taylor, 451 U.S. 527 (1981), the intentional destruction of a prisoner's property is not a violation of due process, when the prisoner has an adequate remedy under state law. The district court also ruled that, accepting Palmer's allegations of harassment as true, it could not conclude that the allegations were of constitutional significance. We agree that under *Parratt* due process is not violated when a state official intentionally deprives an individual of his property by a random and unauthorized act if the state provides an adequate postdeprivation remedy. However, we reverse and remand for further proceedings on Palmer's claim that the alleged nonroutine shakedown of his property by Officer Hudson was an unconstitutional search in violation of his Fourteenth Amendment right to privacy.

[1] Palmer's other claims are without merit and may be disposed of summarily. The district judge properly reasoned that defendant's actions do not constitute cruel and unusual punishment and that the procedures accorded to Palmer in the disciplinary proceedings suffice under the standard of Wolff v. McDonnell, 418 U.S. 539 (1974). The claim that defendant destroyed legal materials during the search of his locker, and so infringed his right of access to the courts, is meritless since there is no indication that Officer Hudson's acts were in retaliation for Palmer's legal activities, *cf.* Russell v. Oliver, 552 F.2d 115 (4 Cir. 1977), nor any indication that other avenues for seeking legal relief were unavailable to Palmer. *Cf.* Williams v. Leake, 584 F.2d 1336 (4 Cir. 1978).

A.

In *Parratt* the Supreme Court held that the negligent loss of a prisoner's property by a prison official was not a due process violation when the state provided an adequate post-deprivation remedy. *Parratt's* scope cannot easily be limited to negligent deprivations of property. For, if the underlying principle is, as Justice Rehnquist stated in a plurality opinion, that when no practical way to provide a predeprivation hearing exists, a postdeprivation hearing will satisfy the dictates of procedural due process, then it as well applies to an intentional deprivation for which meaningful prior review was impractical. *Accord* Engblom v. Carey, 677 F.2d 957 (2 Cir. 1982); Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1352 (9 Cir. 1981), *cert. granted,* sub nom Rutledge v. Kush, 50 U.S.L.W. 3862 (1982).[2]

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[2] *See also* Gilday v. Boone, 657 F.2d 1, 2 n.1 (1 Cir. 1981); Waterstreet v. Central State Hospital, 533 F. Supp. 274 (W.D. Va. 1982); Sheppard v. Moore, 514 F.S. 1372 (M.D.N.C. 1981). Several courts have stated that *Parratt* should not extend to intentional acts. Weiss v. Lehman, 676 F.2d 1320, 23 (9 Cir. 1982); Yusuf Asad Madyun v. Thompson, 657 F.2d 868, 873 (7 Cir. 1981); Schiller v. Strangis, 540 F. Supp. 605 (D. Mass. 1982); Howse v. DeBarry Correctional Inst., 537 F. Supp. 1177 (M.D. Tenn. 1982); McCowen v. City of Evanston, 534 F. Supp. 243, 49 (N.D. Ill. 1982); Peters v. Township of Hopewell, 534 F. Supp. 1324 (D. N.J. 1982); Tarkowski v. Hoogasion, 532 F. Supp. 791, 794-95 (N.D. Ill. 1982); Parker v. Rockefeller, 521 F. Supp. 1013, 16 (N.D. W. Va. 1981).

A common argument for so limiting *Parratt* is that extending its scope to intentional acts drastically undercuts the use of § 1983 as a check on wrongdoing by state officials, its congressionally intended purpose. Howse v. Debarry Correction Inst., *supra;* Tarkowski v. Hoogasion, *supra;* Parker v. Rockefeller, *supra.* However, § 1983 is not a remedy for every wrong committed by state officials, it is only a remedy for those wrongs which are of a constitutional dimension or which violate a federal statute. *Parratt,* of course, did not restrict the availability of § 1983 as a remedy for constitutional wrongs. Instead, it held the constitutional requirement of procedural due process to be satisfied if the state provides a post facto remedy for

Nor do we read any of the separate opinions in *Parratt* to give any persuasive basis on which to conclude that its holding does not encompass an intentional tort. It is true that four justices stated that they would limit *Parratt's* scope to negligent acts, but no persuasive rationale was provided for doing so. Justice Blackmun, with whom Justice White concurred, agreed with the plurality that the impracticality of predeprivation review and the existence of a postdeprivation remedy was relevant to determining if an action violated due process. However, he suggested that the existence of a state tort remedy should not suffice to cure the unconstitutional nature of a state official's intentional act, since an intentional act would rarely be amenable to prior review and since a state tribunal would be unlikely to provide due process when reviewing the deliberate conduct of the state's employees. 451 U.S. at 545-546. Neither rationale for limiting *Parratt's* scope obtains here for there is no practical mechanism by which Virginia could prevent its guards from conducting personal vendettas against prisoners other than by punishing them after the fact, nor have we been given any cause to believe that Virginia courts would be less diligent in protecting prisoners from intentionally inflicted injuries than in protecting them from negligently inflicted injuries.

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an injury inflicted by an official which was not done pursuant to an established policy and was not amenable to prior control. *Parratt* does not impinge upon the right to a § 1983 remedy for an officially inflicted injury done pursuant to an established procedure, which remains a violation of the requirement of procedural due process, Logan v. Zimmerman Brush Co., 50 U.S.L.W. 4247, 4251 (Feb. 23, 1982), or for an official act which violates a substantive constitutional right, such as the right to vote, Duncan v. Poythress, 657 F.2d 691, 704-5 (5 Cir. 1981), or for an official act which is sufficiently egregious to amount to a violation of the requirement of substantive due process, Schiller v. Strangis, 540 F. Supp. 605, 613-15 (D. Mass. 1982).

Justice Marshall intimated that he would limit *Parratt's* scope to negligent deprivations, but he, too, suggested no rationale for the distinction that he was prepared to recognize. 451 U.S. at 555. Justice Powell would limit *Parratt* to nonintentional takings by making intent an essential element of a due process claim on the theory that "deprivation" as used in § 1983 "connotes an intentional act. . . or, at the very least, a deliberate decision not to act to prevent a loss." 451 U.S. at 547-548. However, every other member of the court agreed that a negligent deprivation of property was a due process violation, and that the proper inquiry was whether a postdeprivation remedy could cure the constitutional wrong. As we state above, once it is assumed that a postdeprivation remedy can cure an unintentional but negligent act causing injury, inflicted by a state agent which is unamenable to prior review, then that principle applies as well to random and unauthorized intentional acts.

We therefore conclude that plaintiff has no meritorious cause of action under § 1983 for the allegedly intentional destruction of his property.

B.

We conclude, however, that the district court's entering summary judgment for defendant with regard to an unreasonable search of his property was premature. In his verified complaint plaintiff alleged that "officer Hudson shook down my locker and destroyed. . . my property. . . as a means of harassment. . . . The shakedown was no routine shakedown. It was planned and carried out only as harassment." In moving for summary judgment, defendant filed his affidavit asserting that he and Officer Lephew conducted "a routine search of [plaintiff's] locker" and that "it was merely a routine search for contraband." Plaintiff responded with a

counteraffidavit reasserting that he "knows and believes that the shakedown of Sept. 16, 1981 was not a routine shakedown, but only a form of harassment by [defendant]."

Thus the record reflects a sharp factual conflict as to whether the search was routine or whether it was conducted solely for purposes of harassment. Summary judgment was therefore precluded, Rule 56 F.R. Civ. P., unless it can be concluded that Palmer had no privacy interest in the locker. While we have never considered this issue, numerous other courts have held that prisoners have a limited privacy interest and should be free from unreasonable searches and unjustifiable confiscations.[3] United States v. Hinckley, 672 F.2d 115, 129-32 (D.C. Cir. 1982); United States v. Lilly, 576 F.2d 1240, 1244-47 (5 Cir. 1978); United States v. Stumes, 549 F.2d 831, 32 (8 Cir. 1977); Sostre v. Preiser, 519 F.2d 763, 764-65 (2 Cir. 1975); Bonner v. Coughlin, 517 F.2d 1311, 1315-17 (7 Cir. 1975), *aff'd on rehearing*, 545 F.2d 565 (1976) (in banc), *cert. denied*, 435 U.S. 932 (1978). United States v. Savage, 482 F.2d 1371, 1372 (9 Cir. 1973); Daughtery v. Harris, 476 F.2d 292, 294 (10 Cir.), *cert. denied*, 414 U.S. 872 (1973). *But see* United

[3] In Lanza v. New York, 370 U.S. 138, 142-43 (1962), the Court intimated that Fourth Amendment protections would not extend to a prison cell. The continuing validity of this reasoning is doubtful, for in Katz v. United States, 389 U.S. 347 (1967), the Court rejected the "constitutionally protected area" test upon which the *Lanza* dicta was based. In United States v. Edwards, 415 U.S. 800, 808 n.9 (1974), the Court expressly left open the question whether prisoners possessed privacy rights. In Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974), it stated that, as a general rule, prisoners should be accorded those constitutional rights which are not inimical to prison administration or security. In Bell v. Wolfish, 441 U.S. 520, 555-60 (1979), the Court again expressly refused to address the question of whether prisoners possessed any privacy rights, merely holding that whatever rights they retained were limited, and not violated by cell block shakedowns, or body cavity searches conducted after prisoner contact with outsiders.

States v. Hitchcock, 467 F.2d 1107 (9 Cir. 1972), *cert. denied*, 410 U.S. 916 (1973).

In defining privacy rights in prison we are guided by the general principle that prisoners should be stripped of only those constitutional rights which would impair prison security or administration. *Cf.* Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974). However, this is not to say that prisoners have the same privacy interests as those not in prison. Because of the legitimate demands of prison security, and to a lesser extent a prisoner's diminished expectation of privacy,[4] neither a warrant nor probable cause is a prerequisite to a search or seizure in prison. *See, e.g.*, United States v. Lilly, 576 F.2d at 1244; United States v. Stumes, 549 F.2d at 832; Bonner v. Coughlin, 517 F.2d at 1317. Irregular, unannounced shakedown searches of prisoner property are permissible, for they are an effective means of ensuring that prisoners do not possess contraband. Bell v. Wolfish, 441 U.S. 520, 555-57 (1979); Olson v. Kleeker, 642 F.2d 1115 (8 Cir. 1981). Shakedown searches of single individuals are troubling, however, for there is an ever present danger that the search was motivated by a guard's personal desire to harass or humiliate the inmate, and not by legitimate institutional concerns. *See* Wayne R. LaFave, 3 Search & Seizure § 10.9 (1978). Needless to say, a primary purpose of the Fourth and Fourteenth Amendments is to protect individuals from such arbitrary and oppressive invasions of personal security. Delaware v. Prouse, 440 U.S. 648, 653-54 (1979).

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[4] Denying prisoner privacy rights merely because of the absence of an expectation of privacy is circular reasoning. Prisoners will come to expect that level of privacy which is accorded to them. Giannelli & Gilligan "Prison Searches and Seizures: 'Locking' The Fourth Amendment Out of Correctional Facilities", 62 Va. L. Rev. 1045, 1058-63 (1976).

But individual shakedown searches, such as that here, may legitimately be grounded upon either a prison policy of conducting random searches of single cells or blocks of cells to deter or discover the possession of contraband, or upon the existence of some reasonable basis for a belief that the prisoner possesses contraband. We recognize that allowing the prison authorities to adopt a program of random individual searches may provide an increased opportunity for prison officials to abuse that power and utilize searches as a means of harassment; however, the device is of such obvious utility in achieving the goal of prison security that we do not think that the risk outweighs the benefit.[5] Prisoners will be accorded some protection from abusive searches by requiring prison authorities, if the validity of the search is questioned, to prove that adequate grounds existed to justify the search. *Cf.* United States v. Lilly, 576 F.2d at 1245. When the search is a shakedown of a particular prisoner's property, this may be done in one of two ways: either by proving that the search was done pursuant to an established program of conducting random searches of single cells or groups of cells reasonably designed to deter or discover the possession of contraband, *cf.* United States v. Ready, 574 F.2d 1009, 1014 (10 Cir. 1978) (search permissible without specific cause when done pursuant to routine reasonably designed to promote institutional security); or, by proving that some reasonable basis existed for the belief that the prisoner possessed contraband. In assessing the validity of a proferred justification for a search, a court should, of

[5] Some justification for an absolute prohibition of individual shakedown searches can be found in Delaware v. Prouse, *supra*, where the Supreme Court invalidated a state program of conducting random spot checks of automobiles, in part because of the inherent danger of arbitrary conduct by the police, despite the admitted utility of such a practice.

course, consider direct proof offered by the plaintiff that the search was impermissibly motivated, by a desire to harass or humiliate him, such as evidence of other acts of harassment by the defendant.

If the defendant is unable to establish that the search was permissibly motivated and conducted in a reasonable manner, then the plaintiff is entitled to at least nominal damages. In an appropriate case where his injury is greater, he may be entitled to both actual and punitive damages. *See* United States v. Calandra, 414 U.S. 338, 354 n.10 (1974); Baskin v. Parker, 588 F.2d 965 (5 Cir. 1979); O'Connor v. Keller, 510 F. Supp. 1359 (D. Md. 1981). Parratt v. Taylor does not trench upon the right to a § 1983 remedy for an unreasonable search, for the right violated is the substantive right to privacy and not a right to procedural due process. *See* Parratt v. Taylor, 451 U.S. at 534-6 [distinguishing Monroe v. Pape, 365 U.S. 167 (1961)].

Because we conclude that Palmer had a limited privacy right which may have been violated, we reverse the district court's judgment as to this claim and remand for an evidentiary determination.

AFFIRMED IN PART,
REVERSED IN PART AND
REMANDED.

Office - Supreme Court, U.S.
FILED
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CLERK

No. 82-6695

IN THE

SUPREME COURT OF THE UNITED STATES

RUSSELL T. PALMER,

Cross-Petitioner,

v.

TED S. HUDSON,

Cross-Respondent.

BRIEF IN OPPOSITION TO THE CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. Does the intentional deprivation of property by an official's abuse of power constitute a due process violation not withstanding the existence of State remedies?

II. Does the intentional deprivation of property by an official's abuse of power constitute a due process violation where State relief is available?

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No. 82-6695

IN THE

SUPREME COURT OF THE UNITED STATES

RUSSELL T. PALMER,

Cross-Petitioner,

v.

TED S. HUDSON,

Cross-Respondent.

BRIEF IN OPPOSITION TO THE CROSS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS

The opinion of the United States District for the Western District of Virginia is unreported and was included as Appendix A to Petitioner Hudson's Petition for Writ of Certiorari. The opinion of the Court of Appeals is as yet unreported and was included as an appendix to Petitioner Husdon's Petition for Writ of Certiorari.

JURISDICTION

The jurisdiction of this Court is founded on 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On September 16, 1981, the cross-petitioner's cell at the Bland Correctional Center was subjected to a shakedown search for contraband by prison authorities. Palmer alleged in his pro se suit filed on September 28, 1981, in the United States District Court for the Western District of Virginia, that during the course of this search certain of his property was destroyed in an effort to harass him.

Palmer further alleged that the shakedown search was not routine and was planned and carried out as a form of harassment.

Cross-petitioner also alleged that on September 17, 1981, he was again harassed by Officer Hudson and suffered disciplinary action as a result of Correctional Officer Hudson's placement of a false charge against him.

By an order of November 17, 1981, the District Court accepted as true Palmer's allegations and found that they did not rise to the level of a constitutional deprivation.

Palmer appealed to the Fourth Circuit Court of Appeals, and on January 6, 1983, the Court held that while the allegations did state a possible Fourth Amendment violation, the intentional taking and destruction of property was governed by this Court's decision in Parratt v. Taylor, 451 U.S. 527 (1981), and that there was no due process violation.

REASONS FOR DENYING THE WRIT

I. PARRATT V. TAYLOR IS APPLICABLE TO CASES INVOLVING AN ALLEGED INTENTIONAL, ABUSIVE DEPRIVATION OF PROPERTY BY AN OFFICIAL.

It appears to be the contention of cross-petitioner Palmer that where an inmate alleges that he has been deprived of personal property as a result of an abuse of power, as opposed to negligence or a random and unauthorized deprivation, a due process claim cognizable pursuant to 42 U.S.C. § 1983 has been stated and this Court's decision in Parratt v. Taylor is inapplicable. Cross-petitioner's analysis, however, ignores the fact that Parratt, supra, merely holds that the constitutional requirement of procedural due process is satisfied if the State provides a post facto remedy for an injury inflicted by an official which was not done pursuant to an established policy and was not amenable to prior control. Parratt does not impinge upon the right to a § 1983 remedy for an officially inflicted injury done pursuant

to an established procedure, which remains a violation of the requirement of procedural due process, Logan v. Zimmerman Brush Company, 455 U.S. 422 (1982), or for an official act which violates a substantive constitutional right, such as the right to vote, Duncan v. Poythress, 657 F.2d 691, 704-5 (5th Cir. 1981), or for an official act which is sufficiently egregious to amount to a violation of the requirement of substantive due process, Schiller v. Strangis, 540 F.Supp 605, 613-15 (D.Mass. 1982).

In these cases, it is submitted, the rationale of Parratt is inapplicable not because of any artificial distinction as to the nature of the deprivation, but because the post deprivation remedy, if any, is inadequate to preserve the right to due process. For example, in Zimmerman Brush established state procedure rather than providing a means to cure a violation of rights prevented a post deprivation remedy from being utilized. Therefore, it is clear that Parratt's reasoning does not apply because there is no adequate post deprivation remedy. In fact, in Ingraham v. Wright, 430 U.S. 651 (1937), this Court was confronted with the claim that corporal punishment in public schools violated due process. Ingraham, cited with approval in Parratt, and which involved facts more egregious than those presented in Parratt, held that the imposition of additional administrative safeguards as a constitutional requirement before the institution of corporal punishment was unnecessary, and that there was no due process deprivation by the absence of such administrative safeguards when viewed in light of the low incidents of abuse, the openness of the schools, and the common law safeguards that already existed. Ingraham is significant in light of the fact that it involved an allegation of the

intentional abuse of official power by an agent of the State. This Court's conclusion was that such an allegation did not rise to the level of a constitutional deprivation of due process. This is analogous to the case at bar and amounts to a rejection of cross-petitioner's theory that Parratt was misapplied in the instant case.

It is submitted that this Court recognized in Parratt that §1983 is not a remedy for every wrong committed by State officials. It is only a remedy for those wrongs which are of a constitutional dimension and which violate a federal statute. Specifically, this Court noted that in any §1983 action the initial inquiry must focus on whether the two essential elements to a §1983 action are present: (1) whether the conduct complained of was commited by a person acting under the color of state law; and (2) whether this conduct deprived the person of rights, privileges, or immunities secured by the Constitution of the United States. The Court went on to note that nothing in the Fourteenth Amendment protects against all deprivations of life, liberty, or property by the state. The Fourteenth Amendment protects only against deprivations without due process of law. The cross-respondent notes that nothing in Parratt limits its application to any particular type of alleged deprivation. It is submitted that whether the cross-petitioner's claim is based on an abuse of power or the existence of random or unauthorized acts is irrelevant. The significance of Parratt is that it stands for the proposition that where there has been a deprivation of property under color of state law, for whatever reason, and the state provides an adequate remedy to redress that loss, the requirements of due process have been met and the Constitution has not been violated. None of the cases cited by the cross-petitioner

contradict that principle and, it is submitted, therefore, whether the alleged deprivation was the result of an abuse of power or due to random and unauthorized intentional acts, the fact remains that if there is an adequate post-deprivation remedy there is no deprivation of due process.

II. VIRGINIA PROVIDES A DEFINITE, EFFECTIVE POST-DEPRIVATION REMEDY.

It is plaintiff's contention that unlike the State of Nebraska in Parratt v. Taylor, Virginia does not provide a reliable post-deprivation remedy for tort claims. The cross-petitioner reaches this result because, allegedly, "Virginia's civil law is still heavily infested with large pockets of immunity often barring relief". Cross petitioner further contends that at the least the law of Virginia is unsettled and, consequently, there is no certain post-deprivation remedy against official deprivation in fact in Virginia. The cross-petitioner's argument in this regard ignores the existence of §8.01-195.1 et seq of the Code of Virginia which became effective July 1, 1982, and provides for a tort claims act in Virginia similar to the Nebraska tort claims act. These sections specifically provide that the Commonwealth of Virginia will be liable for claims for money due to damage to or loss of property caused by the negligent or wrongful act or omission of any State employee within the scope of his employment.

Therefore, it is submitted that contrary to the cross-petitioner's allegation, the law in Virginia is quite clear that as to claims arising after July 1, 1982, the Commonwealth of Virginia has waived its sovereign immunity and provided a procedure for the resolution of tort claims against it. Consequently, it is incorrect to assume that there is no certain post-deprivation remedy in Virginia and, more importantly, the enactment of the Virginia Tort Claims Act severely restricts the possible application of any rule enunciated by this Court

in this case to the limited facts of the instant case and would preclude application to any case which arises after the effective date of the act. It is, therefore, further submitted that certiorari should be denied because of the limited application and significance of this matter.

III. THE LOWER FEDERAL COURTS HAVE BEEN CONSISTENT IN THEIR APPLICATION OF PARROTT V. TAYLOR.

In support of the proposition of inconsistent application, the cross-petitioner cites a number of cases which, it is submitted, are not supportive of his contention that the lower federal courts have given the decision in Parratt v. Taylor fundamentally varying application. The cross-petitioner cites Wright v. Dallas County Sheriff's Department, 660 F.2d 623 (5th Cir. 1981); Madyun v. Thompson, 657 F.2d 868 (7th Cir. 1981); and Hirst v. Gertzen, 676 F.2d 1252 (9th Cir. 1982) as examples of these types of cases. However, a close examination of these cases indicates that Wright and Madyun are merely cases in which the court of appeals remanded the case for reconsideration in light of Parratt v. Taylor. Wright, Madyun and Hirst do not stand for the proposition that Parratt does not apply to intentional torts, inasmuch as the cases did not involve allegations of intentional conduct.

In Weiss v. Lehman, 676 F.2d 1320 (9th Cir. 1982) cited by the cross-petitioner, the Court merely applied Parratt v. Taylor in the same manner as has this Court. Again, there was no allegation in the case of intentional conduct, and it is, therefore, distinguishable from the instant case.

The cross-respondent submits that contrary to the cross-petitioner's assertion, the lower federal courts are not inconsistent in their application of Parratt v. Taylor. In actuality, given the existence of varying factual patterns, the lower federal courts have been diligent in their adherence to the precepts enunciated by this Court in Parratt.

CONCLUSION

For the reasons set forth above, cross-repondent urges this Court to deny the Writ of Certiorari.

Respectfully submitted,

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ALAN KATZ
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Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Alan Katz, Assistant Attorney General of Virginia, Counsel of Record for the Cross-respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that 3 copies of the foregoing Brief in Opposition To The Petition For Writ of Certiorari were mailed, first class/postage prepaid, to Deborah Wyatt, 917 East Jefferson Street, Charlottesville, Virginia 22901 on or before June 5, 1983.

Alan Katz
Assistant Attorney General

No. 82-6695

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

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RUSSELL THOMAS PALMER, JR.,

Cross-Petitioner,

versus

TED S. HUDSON,

Cross-Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Comes now the Cross-Petitioner, Russell Thomas Palmer, Jr., by his undersigned counsel, and hereby moves this Honorable Court for leave to proceed in forma pauperis. In support he submits the affidavit attached hereto and represents that he has been granted leave to proceed in forma pauperis in the courts below including the United States District Court for the Western District of Virginia, Abingdon Division, and the Fourth Circuit Court of Appeals, to which a Writ of Certiorari is being sought by Cross-Petitioner.

Respectfully submitted,

RUSSELL THOMAS PALMER, JR.

By Counsel

Deborah C. Wyatt
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Counsel for Cross-Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

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RUSSELL THOMAS PALMER, JR.,

Cross-Petitioner,

versus

TED S. HUDSON,

Cross-Respondent.

AFFIDAVIT IN SUPPORT OF MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Deborah C. Wyatt, Counsel for Cross-Petitioner, having been duly sworn, do depose and say as follows:

1. That I was appointed by the Fourth Circuit Court of Appeals to represent Russell Thomas Palmer, Jr., Respondent and Cross-Petitioner herein;

2. That Mr. Palmer proceeded in forma pauperis in the District Court and the Court of Appeals below; and

3. That to the best of my knowledge and belief, Mr. Palmer has recently been released from prison on parole, remains a pauper, and has not contacted me since his release.

DEBORAH C. WYATT

STATE OF VIRGINIA

CITY OF CHARLOTTESVILLE, to-wit:

The foregoing Affidavit was subscribed and sworn to before me by Deborah C. Wyatt, on this 4th day of May, 1983.

Louise N. McLaughlin
Notary Public

My commission expires: June 3, 1984.

RECEIVED
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SUPREME COURT, U.S.

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

RUSSELL THOMAS PALMER, JR.,

Cross-Petitioner,

versus

TED S. HUDSON,

Cross-Respondent.

AFFIDAVIT IN SUPPORT OF MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Russell Thomas Palmer, Jr., having been duly sworn, depose and say as follows:

1. I am a Cross-Petitioner in the above-titled case;

2. I have recently been released from prison on parole, and do not yet have any reliable source of income;

3. Because of my poverty, I am unable to pay fees and costs associated with the above-titled action.

RUSSELL THOMAS PALMER, JR.

STATE OF VIRGINIA

CITY/COUNTY OF _____, to-wit:

The foregoing Affidavit was subscribed and sworn to before me by Russell Thomas Palmer, Jr., on this ____ day of _____, 1983.

Notary Public

My commission expires:_____.

No. 82-6695

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

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RUSSELL THOMAS PALMER, JR.,

Cross-Petitioner,

versus

TED S. HUDSON,

Cross-Respondent.

AFFIDAVIT IN SUPPORT OF MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Russell Thomas Palmer, Jr., being first duly sworn, depose and say that I am the Cross-Petitioner in the above-entitled case; that in support of my motion to proceed on certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issue which I desire to present is the following:

> That an intentional, abusive deprivation of property by an official states a due process violation.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the case are true.

1. Are you presently employed? No

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. 1976, self employed. -WAGE NOT KNOWN-

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? NONE

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months. _____

3. Do you own any cash or checking or savings account? No

   a. If the answer is yes, state the total value of the items owned. _____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? YES

   a. If the answer is yes, describe the property and state its approximate value. ONE 1957 FORD TRUCK, VALUED UNDER $100.00.

5. List the persons who are dependent upon you for support and state your relationship to those persons. SELF

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Russell T. Palmer Jr.

RUSSELL THOMAS PALMER, JR.

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Nos. 82-1630 and 82-6695

In The

Supreme Court of the United States

October Term, 1983

TED S. HUDSON,

v. *Petitioner,*

RUSSELL THOMAS PALMER, JR.,

Respondent.

and

RUSSELL T. PALMER, JR.,

v. *Cross Petitioner,*

TED S. HUDSON,

Cross Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF ON BEHALF OF PETITIONER

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QUESTIONS PRESENTED

1. Does a prison inmate have a reasonable expectation of privacy in prison so that he is entitled to the protection of the Fourth Amendment against unreasonable searches and seizures?

2. If a prisoner, in the context of a prison cell search, is not protected by the specific terms of the Fourth Amendment, can such protection be found under the general terms of the Fourteenth Amendment?

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In The

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TED S. HUDSON,

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF ON BEHALF OF PETITIONER

OPINIONS AND JUDGMENTS BELOW

The Opinion of the United States District Court for the Western District of Virginia, Abingdon Division, entered on November 17, 1981, is not reported and is included in the Joint Appendix at pp. 28-34. The Opinion of the United States Court of Appeals for the Fourth Circuit, issued January 6, 1983, is reported at *Palmer* v. *Hudson*, 697 F.2d 1220 (4th Cir. 1983), and a copy appears at pp. 36-44 of the Joint Appendix.

JURISDICTION

The jurisdiction of this Court for issuing the writ of certiorari in this case is grounded on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AMENDMENTS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section One of the Fourteenth Amendment to the Constitution of the United States provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

Title 42 U.S.C. § 1983 (1981) provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

On September 16, 1981, prison authorities conducted a shakedown search for contraband in the cell occupied by Russell T. Palmer at the Bland Correctional Center. Palmer was incarcerated at Bland because his probation for forgery, uttering, and grand larceny convictions had been revoked after he was convicted on bank robbery charges.

Palmer alleged in his *pro se* suit, filed pursuant to 42 U.S.C. § 1983, that during the course of the September 16 search certain of his property was intentionally destroyed in an effort to harass him. Additionally, he alleged that the search itself was not routine and was planned and carried out solely for harassment purposes. Palmer also alleged that on September 17, 1981, he was again harassed by Hudson, a prison correctional officer, and that he suffered disciplinary action as a result of Hudson's placement of a false charge against him.

By an Order of November 17, 1981, the District Court accepted Palmer's allegations as true and found that they did not rise to the level of a constitutional deprivation. Accordingly, the District Judge granted Hudson's motion for summary judgment and dismissed the complaint. Palmer appealed.

The Court of Appeals affirmed in part, holding that under *Parratt* v. *Taylor,* 451 U.S. 527 (1981), due process is not violated when a state official intentionally deprives

an individual of property if the state provides an adequate post-deprivation remedy. (App. p. 37).

The Court of Appeals also reversed in part, remanding the cause to the District Court because the Fourth Circuit found that Palmer had a Fourteenth Amendment "limited privacy right" which shielded him from "arbitrary and oppressive invasions of personal security." (App. pp. 42, 44.) The Court of Appeals held that if a prisoner questions the validity of a search, prison authorities must prove that adequate grounds existed to justify the search. The court ruled that the search would be an impermissible intrusion on the privacy rights of the prisoner unless prison officials could either prove that the search was done pursuant to an established program of conducting random searches of single cells or groups of cells reasonably designed to deter or discover the possession of contraband, or prove that a reasonable basis existed for the belief that the prisoner possessed contraband. (App. p. 43, 44.) In such a situation the court would award the prisoner "at least nominal damages."

This Court granted the prison guard's Petition for a Writ of Certiorari to consider the applicability of the Fourth Amendment to prison cell searches. Subsequently, the Court granted respondent's Cross Petition for a Writ of Certiorari to consider the scope and meaning of this Court's holding in *Parratt* v. *Taylor*, 451 U.S. 527 (1981).

SUMMARY OF ARGUMENT

In order to invoke the protections of the Fourth Amendment, a person must have a legitimate expectation of privacy. Prior decisions of this Court have strongly suggested that a person confined in a jail or similar facility retains no reasonable expectation of privacy; thus, the Fourth Amendment provides no protection for such a per-

son. Courts have recognized that institutional security considerations justify retraction of those constitutional rights inimical to prison administration.

In order to stem violence and other forms of criminal activity, prison officials must be afforded wide-ranging discretion in employing security measures which will both control and protect inmates. Society, the courts, and the prisoners themselves demand a decent living environment for inmates. The most effective way to meet this goal is through the use of random prison searches which help ferret out weapons, drugs, contraband and other items which could be misused. Retention of Fourth Amendment rights by prisoners is inconsistent with the close and constant monitoring of inmates necessary to preserve institutional security. Accordingly, this Court should establish the "bright line" rule that a prisoner has no legitimate expectation of privacy in prison, and that the Fourth Amendment does not extend to prison cell searches.

The Court of Appeals inexplicably found that Palmer had a substantive right of privacy emanating from the Fourteenth Amendment that was not linked to the Fourth Amendment. This Court has recognized that the Fourteenth Amendment guarantees a substantive right to fundamental personal privacy—but only in limited circumstances. No decision of this Court, however, has intimated that an inmate has a right to privacy from searches and seizures other than any rights that may be afforded him by the Fourth Amendment.

Assuming, *arguendo*, that the Fourth Amendment applies to a prison cell search, the Court of Appeals erroneously held that once the validity of a search is questioned by an inmate, the burden of proof shifts to prison officials to establish the propriety of the search. This holding is in

contravention of the well-established general principle that the burden of proof initially rests with the plaintiff. There is no reason in logic or law to reallocate the burden of proof under the facts of this case. Furthermore, the court's holding will most likely only increase the load of an already overburdened court system by presenting to inmates the prospect of forcing prison officials to respond to—and indeed to disprove—their unproven allegations.

Finally, assuming *arguendo*, that the Fourth Amendment applies to a prison cell search, the search in question was reasonable. The governmental interest in prison security outweighs whatever privacy interest an inmate might retain for Fourth Amendment purposes.

ARGUMENT

I.

The Fourth Amendment Does Not Extend To A Search By Prison Authorities Of A Cell Occupied By An Inmate.

A.

The Fourth Amendment Only Applies When There Is A Reasonable Expectation Of Privacy.

The Fourth Amendment carries "a rich historical background" rooted in American, as well as English, experience." 1 W. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment* § 1.1, at 3 (1978) [hereinafter LaFave, *Treatise*] (quoting J. Landynski, *Search and Seizure and the Supreme Court*, ch. 1 (1966)). In England, protections similar to those afforded by the Fourth Amendment were historically directed against the Crown. William Pitt eloquently addressed the thrust of these protections when he stated:

> The poorest man may, *in his cottage*, bid defiance to all the force of the Crown. It may be frail; its roof may

> shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.

1 LaFave, *Treatise* § 1.1, at 4 (citing N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 49-50 (1937)) (emphasis added).

In American colonial times, the writ of assistance was used by customs officers to enter and search buildings for smuggled goods. 1 LaFave, *Treatise* § 1.1, at 4. Substantial criticism was voiced shortly after our Constitution was ratified because it failed to proscribe arbitrary searches and seizures. Thereafter, President Washington urged the addition of a bill of rights which would include protection against unreasonable searches and seizures.

In *Boyd* v. *United States*, 116 U.S. 616 (1886), the Supreme Court's early landmark decision regarding search and seizure, the Court linked the Fourth and Fifth Amendments by indicating that there existed no substantial difference between compelling the production of evidence and self-incrimination. Later, the Court shifted the type of analysis given Fourth Amendment cases to a property-oriented view which focused on whether a trespass had occurred on a person's property. *See Olmstead* v. *United States*, 277 U.S. 438 (1928); *Goldman* v. *United States*, 316 U.S. 129 (1942). The evolution of Fourth Amendment doctrine continued in *Silverman* v. *United States*, 365 U.S. 505 (1961), in which the Court adopted a "constitutionally protected area" rationale. There the Court stated that its decision did "not turn upon the technicality of a trespass upon a party wall as a matter of local law," *id.* at 512, and that "Fourth Amendment rights [were] not inevitably

measurable in terms of ancient niceties of tort or real property law," *id.* at 511.

In *Katz* v. *United States*, 389 U.S. 347 (1967), this Court rejected the prior property-oriented view of the Fourth Amendment and held that the interest protected by the Amendment hinges upon the existence of a reasonable expectation of privacy rather than upon an invasion of rights associated with property. The case concerned whether the police, by attaching a listening device to the outside of a public telephone booth and recording Katz's conversation while inside, had violated his Fourth Amendment rights. The Court rejected the "constitutionally protected" area analysis and embraced the proposition, first enunciated in *Katz*, that "the Fourth Amendment protects people, not places." 389 U.S. at 351.

Justice Harlan's concurring opinion in *Katz* set forth the seminal conceptual framework for determining whether a person has a reasonable expectation of privacy.[1] Justice Harlan asserted that "there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" 389 U.S. at 361 (Harlan, J., concurring). This language remains today the foundation for Fourth Amendment analysis, but the twofold requirement has been distilled into

[1] As the Court stated in *Smith* v. *Maryland*, 442 U.S. 735, 740 (1979), "[T]his Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *See also Rakas* v. *Illinois*, 439 U.S. 128, 143 n.12 (1978); *id.* at 150-51 (Powell, J., concurring); *id.* at 164 (White, J., dissenting); *United States* v. *Chadwick*, 433 U.S. 1, 7 (1977); *United States* v. *Miller*, 425 U.S. 435, 442 (1976); *United States* v. *Dionisio*, 410 U.S. 1, 14 (1973); *Couch* v. *United States*, 409 U.S. 322, 335-36 (1973); *United States* v. *White*, 401 U.S. 745, 752 (1971) (plurality opinion); *Mancusi* v. *DeForte*, 392 U.S. 364, 368 (1968); *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968).

the general inquiry: Does the person invoking the Fourth Amendment protection have a legitimate expectation of privacy?

Consistent with recent Fourth Amendment decisions, *Illinois* v. *LaFayette*, 51 U.S.L.W. 4829 (U.S. June 20, 1983); *Illinois* v. *Gates*, 51 U.S.L.W. 4709 (U.S. June 8, 1983); *New York* v. *Belton*, 453 U.S. 454 (1981), this Court must now establish a "bright line" test that prison officials can readily apply in day-to-day prison operations. "A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be 'literally impossible of application by the officer in the field.' " 453 U.S. at 454 (quoting LaFave, *"Case-by-Case Adjudication" versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 Sup. Ct. Rev. 127, 141).

This case presents the Court the opportunity to confirm that which was strongly implied in *Lanza* v. *New York*, 370 U.S. 139 (1962), and *Bell* v. *Wolfish*, 441 U.S. 520 (1979): A prisoner is not entitled to Fourth Amendment protections in prison.

B.

THE PARAMOUNT INTERESTS OF PRISON SECURITY AND INTERNAL ORDER WHICH ARE INHERENT IN A PRISON SETTING ABROGATE ANY REASONABLE EXPECTATION OF PRIVACY WHICH AN INMATE MAY CLAIM, MAKING THE FOURTH AMENDMENT INAPPLICABLE BEHIND PRISON WALLS.

In two recent cases, this Court has touched upon, but left open, the question of whether an inmate retains any Fourth Amendment rights in a prison setting. In *United States* v. *Edwards*, 415 U.S. 800, 808 n.9 (1974), the Court stated: "We thus have no occasion to express a view

concerning those circumstances surrounding custodial searches incident to incarceration which might 'violate the dictates of reason either because of their number or their manner of perpetration.'" (quoting *Charles* v. *United States*, 278 F.2d 386, 389 (9th Cir.), *cert. denied*, 364 U.S. 831 (1960)). Likewise, in *Bell* v. *Wolfish*, 441 U.S. 520 (1979), the Court found it unnecessary to reach the present issue because the Court assumed, without deciding, that inmates retained some diminished Fourth Amendment rights. Nevertheless, in that case, the Court readily upheld the searches in question. 441 U.S. at 556, 558.

The genesis of the proposition that the Fourth Amendment does not apply to a prison search is found in *Lanza* v. *New York*, 370 U.S. 139 (1962). Justice Stewart, writing for the plurality, expressed the view that a public jail is not the equivalent of a person's home for Fourth Amendment purposes. The Court there upheld the surreptitious electronic interception of a jail inmate's conversation with his brother. In addressing the Fourth Amendment question, Justice Stewart said:

> But to say that a public jail is the equivalent of a man's "house" or that it is a place where he can claim constitutional immunity from search or seizure of his person, his papers, or his effects, is at best a novel argument. To be sure, the Court has been far from niggardly in construing the physical scope of Fourth Amendment protection. . . . Yet, without attempting either to define or to predict the ultimate scope of Fourth Amendment protection, it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. *In prison, official surveillance has traditionally been the order of the day.*

Id. at 143 (emphasis added).

While the above-quoted language in *Lanza* was dictum, its conceptual vitality was recognized in *Bell* v. *Wolfish*, 441 U.S. at 556-57. There the Court, referring to *Lanza*, said: "It may well be argued that a person confined in a detention facility has no reasonable expectation of privacy with respect to his room or cell and that therefore the Fourth Amendment provides no protection for such a person." In *Bell*, the Court upheld the most intrusive type of searches, *i.e.*, anal and genital inspections, without requiring prison officials to justify such searches with probable cause or even reasonable suspicion.

As noted earlier, *Bell* simply assumed, *arguendo*, that the Fourth Amendment applied to the facts of that case. One can hardly read *Bell*, however, without recognizing the obvious importance the Court placed upon prison security considerations in resolving the Fourth Amendment issues presented. The Court plainly recognized that security considerations significantly outweigh any minimal privacy rights which even *pretrial* detainees might arguably retain. The Court specifically noted that "[l]awful incarceration brings about the necessary *withdrawal* or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." 441 U.S. at 545-46 (emphasis added). Moreover, the Court stressed that maintaining institutional security and preserving order and discipline are essential correctional goals that may require limitation or *retraction* of any arguably retained constitutional rights of both convicted prisoners and pretrial detainees. *Id.* at 546.

Central to all other correctional goals is the institutional consideration of internal security. In response to a survey on prison violence, forty-one states reported that, in 1981, seventy-three inmates had been murdered by other inmates;

in addition, the Federal Bureau of Prisons reported fifteen inmate murders. For the first half of 1982, thirty inmate homicides were reported from the states and five from the federal system. *Prison Violence*, VII Corrections Compendium No. 8, 1 (1983). Twenty-nine riots or disturbances were reported in the same systems from July 1, 1981, to June 30, 1982. *Id.* The Serious Incident Report Statistics of the Virginia State Penitentiary, from 1979 through the first quarter of 1983, showed 134 inmate assaults on other inmates, 7 homicides, 102 inmate assaults on prison staff, and 61 fires. These statistics are not surprising given the often violent nature of many inmates and their desire to obtain contraband such as drugs, money and weapons.

Prison officials must, as the Court recognized in *Bell*, 441 U.S. at 547, be free to take appropriate action to ensure the safety of inmates and prison personnel and to prevent escape or unauthorized entry. Prison administrators must, therefore, be accorded wide-ranging deference in the adoption and execution of policies and practices which, in their judgment, are needed to preserve internal order and discipline. *Id.* This Court noted in *Bell* that even when an institutional restriction infringes upon a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in light of the central objective of safeguarding institutional security. *Bell*, 441 U.S. at 547 (citing *Jones* v. *North Carolina Prisoners' Union*, 433 U.S. 119, 129 (1977)).

Petitioner well recognizes that under the Court's holding in *Wolff* v. *McDonnell*, 418 U.S. 539, 555-56 (1974), prisoners should be accorded those constitutional rights which are not inimical to prison administration or security. "There is no iron curtain drawn between the Constitution and the prisons of this country." *Id.* at 555-56. Nevertheless, in

recounting in *Wolff* the constitutional rights retained by prisoners, this Court did not once mention the Fourth Amendment or in any other manner suggest that Fourth Amendment rights were retained by prisoners. *Id.* at 556. The Court recognized that there must be some "mutual accommodation between institutional needs and objectives and the [particular] provisions of the Constitution that are of general application." *Id.* Accordingly, in *Wolff*, it was not surprising that the Court held that prisoners had certain due process rights because the state itself had provided a statutory scheme for good conduct credit time and had also specified that such time was to be forfeited only for serious misbehavior. Most significantly, according prisoners such rights does not detract from essential prison security.

The holdings of *Bell* and *Wolff* harmonize easily. Inmates retain constitutional rights, such as religious freedom, access to the courts, protection from cruel and unusual punishment and protection from invidious discrimination based on race, because these rights do not interfere with institutional security. To the contrary, exercise of these rights may be deemed to promote institutional security by easing the daily burdens inmates face in a necessarily regimented, restrictive setting. Retention of privacy rights, on the other hand, would substantially encroach upon the security of prisons and prisoners by unnecessarily impeding prison officials as they seek to prevent breaches of prison security.

In *Marrero* v. *Commonwealth*, 222 Va. 754, 284 S.E.2d 809 (1981), the Supreme Court of Virginia foresaw a crippling effect on security if inmates retained privacy rights. Citing *Bell*, the Virginia court found that the retention of any Fourth Amendment rights by prisoners would be inconsistent with the close and constant monitoring of

inmates necessary to preserve an institution's security. *Id.* at 755-56, 284 S.E.2d at 811. The Virginia Supreme Court acknowledged that prisons are not absolutely secure, and that no one method of searching can eliminate the possession of contraband by prisoners and the security danger it presents. The court then held:

> For one to advocate that prison searches must be conducted only pursuant to an enunciated general policy or when suspicion is directed at a particular inmate is to ignore the realities of prison operation. Random searches of inmates, individually or collectively, and their cells and lockers are valid and necessary to ensure the security of the institution and the safety of inmates and all others within its boundaries. This type of search allows prison officers flexibility and prevents inmates from anticipating, and thereby thwarting, a search for contraband. Such searches may be conducted by prison authorities without notice, and in the absence of probable cause or specific information that contraband is present. Marrero's locker afforded him a right of privacy in relation to other inmates, but not as to prison security officers.

222 Va. at 757, 284 S.E.2d at 811.[2]

This Court should not hesitate to adopt the *Marrero* rule as its "bright line" test. As set forth in *Katz*, no Fourth

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[2] *Accord United States* v. *Hitchcock*, 467 F.2d 1107 (9th Cir. 1972), *cert. denied*, 410 U.S. 916 (1973); *Christman* v. *Skinner*, 468 F.2d 723 (2d Cir. 1972); *Gettleman* v. *Werner*, 377 F. Supp. 445 (W.D. Pa. 1974); *Hoitt* v. *Vitek*, 361 F. Supp. 1238 (D.N.H. 1973); *Robinson* v. *State*, 312 So. 2d 15 (Miss. 1975); *State* v. *Brotherton*, 465 P.2d 749 (Or. App. 1970). *But see United States* v. *Hinckley*, 672 F.2d 115, 129-32 (D.C. Cir. 1982); *United States* v. *Lilly*, 576 F.2d 1240, 1244-47 (5th Cir. 1978); *United States* v. *Stumes*, 549 F.2d 831, 831-32 (8th Cir. 1977) (per curiam); *Bonner* v. *Coughlin*, 517 F.2d 1311, 1315-17 (7th Cir. 1975), *aff'd on rehearing*, 545 F.2d 565 (1976) (en banc), *cert. denied*, 435 U.S. 932 (1978).

Amendment protection exists unless the person claiming its protection can establish a reasonable expectation of privacy. Historically, official surveillance has been the order of the day in prison. It is the rule, not the exception. From the moment a convict enters a prison, he knows that he will be watched. Prison cells are designed so that guards can easily view the occupants. Prison guards are instructed to patrol the cell areas regularly.[3] Shower areas are generally open so that guards may observe the inmates. Guards stand watch while prisoners eat, use recreational facilities, work at their jobs and go to school. At many prisons, inmates must get written authorization to enter buildings other than their cell buildings. "It is . . . certain that a prison cell is not a place where the occupant can expect privacy or a place where he can expect to be free from search and seizure unless accompanied by a warrant." *Robinson* v. *State*, 312 So. 2d 15, 18 (Miss. 1975). It is simply unrealistic to suggest that an inmate should reasonably expect to carry the Fourth Amendment in his pocket when he passes through the prison gate.

The discussion to this point has focused primarily on security measures as a necessary means of control over those confined in prisons. However, security measures serve not only a control purpose; they also help the state meet its obligations to provide a decent living environment for inmates.

Once the state lawfully exercises authority to confine an

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[3] The need for continuous surveillance of prisoners has been stressed by a number of experts, including the American Correctional Association, which recommends in its *Standards for Adult Local Detention Facilities* (2d ed. 1981) that written policy and procedure require that all high and medium security inmates be personally observed by a correctional officer at least every thirty minutes, but on an irregular schedule. More frequent observation is recommended for certain other types of inmates.

individual for violation of its criminal laws, it must assume the responsibility of assuring that the conditions of that confinement do not constitute cruel and unusual punishment. *See Pugh* v. *Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd as modified sub nom. Newman* v. *Alabama*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part on other grounds sub nom. Alabama* v. *Pugh*, 438 U.S. 781 (1978). The state may not expose a committed individual to living conditions which are barbarous, which shock the conscience, or which are inconsistent with contemporary standards of decency. *Rhodes* v. *Chapman*, 452 U.S. 337 (1981); *Trop* v. *Dulles*, 356 U.S. 86, 99-101 (1958).

Courts have specifically delineated the types of harms against which inmates must be protected. A prisoner has a constitutional right to be reasonably protected from the constant threat of violence and sexual assault from his fellow inmates. *Hewitt* v. *Helms*, 103 S. Ct. 864 (1983); *Woodhous* v. *Virginia*, 487 F.2d 889 (4th Cir. 1973). Where a pervasive risk of harm is present in a prison, the constitutional prohibition against cruel and unusual punishment requires that prison officials exercise reasonable care to provide protection from unreasonable risks of harm. *Withers* v. *Levine*, 615 F.2d 158 (4th Cir. 1980). Negligence by prison officials in the performance of their duty of care may be a violation of a constitutional right and actionable under 42 U.S.C. § 1983. *Id.* Similarly, in *Smith* v. *Wade*, 103 S. Ct. 1625 (1983), this Court held that a reckless failure to protect an inmate from an obvious danger of assault may justify an award of punitive damages in a § 1983 action.

Clearly the cases cited above reveal that society has placed the burden on prison administrators to be responsible for maintaining internal order and discipline, and for

securing their institutions against unauthorized access or escape. Additionally, penal authorities have the Herculean task of maintaining the physical security and well-being of violent and dangerous criminals. The most effective means of accomplishing this task is through the use of prison searches to eliminate weapons and contraband.

If both society and inmates expect prison officials to protect prisoners from excessive violence, it inevitably follows that both society and inmates expect prison officials to use appropriate means to discharge that obligation. Thus, there is no basis for the contradictory argument that society should recognize a prisoner's claim of privacy while demanding that officials protect violent men from one another.

If this Court were to hamstring prison officials by requiring that, as a condition to a lawful search, they prove either an organized plan for random searches or a reasonable basis for believing that an individual possesses contraband, as the Fourth Circuit required below. The precarious balance between institutional tranquillity and chaos would surely suffer. This is precisely the point made by the Virginia Supreme Court in *Marrero*. Only the naive would suggest that ingenious prisoners would not find a way to discover the institution's random search plan and thereby avoid its operation. Furthermore, imposing a "reasonable suspicion" requirement ignores the fact that prison officials must deal with those who have already shown a proclivity towards illegal conduct. Unlike ordinary citizens who are cloaked with the presumption of innocence, felons such as Palmer have already been convicted of at least one serious crime. If prison officials must delay action until "reasonable suspicion" develops, they face the increased risk that an always potentially dangerous situation may erupt.

Moreover, searches related to security can involve more

than efforts to discover just drugs and obvious weapons. Prison officials must vigilantly seek to find items which are not inherently contraband, for example, items which can be used to escape (floor plans or maps), which can be converted into weapons (kitchen utensils), which can be used to start cell fires (lighter fluid), or which can be used to create health hazards (insecticides). Yet, the Fourth Circuit would apparently lump all these types of searches together under the rubric of "shakedown searches" and impose proof of either an "organized random plan" or "reasonable belief" standard before prison officials could step in to prevent potential disaster.

While all agree that prisoners should not be harassed or abused, the Fourth Circuit has simply overreacted to the allegations of one convicted felon who, as the District Court points out in its opinion, could have sought redress in the state courts for any improper conduct by prison officials.[4] (App. p. 31.) The court has turned the Fourth Amendment on its head and converted it into a tort claims act. Security is unjustifiably sacrificed upon the altar of *allegata*, and it is entirely likely that the ones who will suffer most if this decision stands are the prisoners whose security would be threatened. Quite plainly, the Court of Appeals ignored the fact that this Court has admonished the lower federal courts not to interject themselves into prison administration absent violations of fundamental con-

[4] If this Court holds that the Fourth Amendment does not extend to a prison cell search, prisoners are not left without redress on those occasions where prison officials conduct searches that are intended to harass or abuse them. In Virginia, relief may be obtained by filing suit under various tort theories or through the Virginia Tort Claims Act as embodied in Va. Code §§ 8.01-195.1 *et seq.* Additionally, relief could be sought under 42 U.S.C. § 1983 by proving a violation of the Eighth Amendment's proscription against cruel and unusual punishment.

stitutional rights. *Procunier* v. *Martinez*, 416 U.S. 396, 405 (1974).

Petitioner strongly urges this Court to recognize the obvious: the importance of prison security considerations abrogates any reasonable expectation of privacy on the part of an inmate. Accordingly, this Court should hold that the Fourth Amendment does not apply in a prison setting.

II.

An Expectation Of Privacy Cannot Be Found In The General Terms Of The Fourteenth Amendment.

The Fourth Amendment right to privacy in the search and seizure context is applied to the states by the Due Process clause of the Fourteenth Amendment. *Mapp* v. *Ohio*, 367 U.S. 643, 655 (1961). By its own terms, however, the Fourteenth Amendment does not address search and seizure or an inmate's right to privacy. Citing *Delaware* v. *Prouse*, 440 U.S. 648 (1979), the Fourth Circuit inexplicably attempted in this case to find an independent Fourteenth Amendment right to privacy not linked to the Fourth Amendment. (App. p. 42.) Yet *Prouse* uses the Fourteenth Amendment only as a conduit to apply the Fourth Amendment to state action.

This Court has recognized that the Fourteenth Amendment guarantees a substantive right to fundamental personal privacy, but only in limited circumstances involving intimate personal relations. *See, e.g., Zablocki* v. *Redhail*, 434 U.S. 374 (1978) (marriage); *Carey* v. *Population Services International*, 431 U.S. 678 (1977) (contraception); *Roe* v. *Wade*, 410 U.S. 113 (1973) (abortion); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) (birth control); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942) (sterilization).

No such fundamental right, however, is involved in this case. In the prison setting, an inmate has no right to privacy with respect to searches and seizures other than any right that may be afforded him by the Fourth Amendment. This Court has never held, except in the area of fundamental personal liberty, that the Fourteenth Amendment contains an independent right to privacy. To the extent that the Court of Appeals predicated its holding upon the prisoner's "Fourteenth Amendment right to privacy" (App. p. 37), it committed clear error, and its judgment should be reversed.

III.

Assuming, *Arguendo*, That The Fourth Amendment Extends To A Prison Cell Search, The Court Of Appeals Impermissibly Shifted The Burden Of Proof To Prison Officials To Prove The Reasonableness Of The Search Before The Prisoner Made A Prima Facie Case.

The court below indicated that prisoners should be accorded some protection from abusive searches. The court held that once "the validity of the search is questioned," prison authorities must "prove that adequate grounds existed to justify the search," either by proving that the search was done pursuant to an established program of conducting random searches or by proving that some reasonable basis existed for the belief that the prisoner possessed contraband.[5] (App. p. 43.) The Court of Appeals thereby improperly places the burden of proof upon prison officials

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[5] Should this Court find that the Fourth Amendment does not apply to prison searches, then this issue is moot. If, however, a limited Fourth Amendment right does exist, Arguments III and IV should be considered by the Court even though not specifically raised in the petition. The issues raised in Arguments III and IV have a significant bearing on how this case should be resolved if petitioner does not prevail on the two stated issues.

when prisoners merely question the validity of a search.[6] (App. p. 43.) Thus, even if this Court extends the Fourth Amendment to a prison cell search, it should still reverse that portion of the decision below which impermissibly shifted the burden of proof to prison officials.

Generally, the burden of proof in civil cases "rests upon the party asserting [a disputed fact or issue]." 9 J. Wigmore, *Evidence* § 2489 n.2, at 301 (Chadbourn rev. 1981) (quoting *Miller* v. *Kruggel*, 165 Kan. 435, 439, 195 P.2d 597, 599 (1948)). The rationale for placing the burden of proof upon the plaintiff is that it is the plaintiff who "seeks to change the present state of affairs and who therefore *naturally* should be expected to bear the risk of failure of proof or persuasion." V. Ball, R. Barnhart, K. Brown, G. Dix, E. Gellhorn, R. Meisenholder, E. Roberts & J. Strong, *McCormick's Handbook of the Law of Evidence* § 337, at 786 (2d ed. 1972) (emphasis added). Not until the plaintiff establishes a prima facie case does the burden shift to the defendant. 9 J. Wigmore, *Evidence* § 2494 n.2, at 379. *See Delaware Coach Co.* v. *Savage*, 81 F. Supp. 293, 296 (D. Del. 1948).

Civil rights cases in which plaintiffs allege deprivations of constitutional rights are treated no differently. *See, e.g., Whitsel* v. *Southeast Local School District*, 365 F. Supp. 312 (N.D. Ohio 1972), *aff'd*, 484 F.2d 1222 (6th Cir. 1973). In *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973), this Court held that "[t]he complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. . . . The burden then must shift to the [defend-

[6] It is unclear from the court's decision whether allegations of harassment contained in the pleadings suffice to shift the burden of proof to prison officials or whether an affidavit from the inmate is the triggering device.

ant]. . . ." Later, the Court recognized the "general principle that *any* Title VII plaintiff *must* carry the initial burden of offering evidence adequate to create an inference that [the defendant's] employment decision was based on a discriminatory criterion illegal under the Act." *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 358 (1977) (emphasis added).

Indeed, this general principle has been applied in 42 U.S.C. § 1983 actions, *see Tagupa* v. *Board of Directors*, 633 F.2d 1309, 1312 (9th Cir. 1980); *see also Adams* v. *McDougal*, 695 F.2d 104, 106 (5th Cir. 1983); *McClure* v. *Cywinski*, 686 F.2d 541, 545 (7th Cir. 1982), including § 1983 suits brought by prisoners. *See, e.g., Jones* v. *Franzen*, 697 F.2d 801, 803 (7th Cir. 1983) (reasonableness of prison policy relevant only after prisoner establishes "prima facie case of violation of his constitutional rights"); *Palmigiano* v. *Mullen*, 491 F.2d 978, 980 (1st Cir. 1974) (burden to "show with convincing particularity" that prison classification board violated its own regulations); *Berry* v. *Schmidt*, 341 F. Supp. 1025, 1026 (W.D. Wis. 1972) (prisoner had burden of showing regulation was "arbitrary and unreasonable").

These cases indicate that, contrary to the holding of the Court of Appeals below, rather than the initial burden being placed on prison officials to prove that adequate grounds existed to justify a "questioned" prison search, the burden is first properly placed on the plaintiff to establish that the search complained of has violated some constitutional right, in this case the Fourth Amendment. At that point, and at that point only, should prison authorities be required to go forward with evidence which establishes the reasonableness of the search. Certainly, a prisoner's mere conclusory allegation is inadequate to shift to prison offi-

cials the burden of proving that the search was permissibly motivated and conducted in a reasonable manner.

Shifting the burden to corrections officials upon allegations of Fourth Amendment violations would ill serve the ends of justice in another way: it would undoubtedly increase the burden on our already overloaded courts. Prisoners' suits form a very large part of that load—one that will continue to increase if prisoners are encouraged to file suit by the prospect of forcing prison officials to disprove baseless allegations. Justice Powell in *Parratt* v. *Taylor* wrote:

> Professor Whitman [Whitman, *Constitutional Torts*, 79 Mich. L. Rev. 5 (1980)] noted, for example, that civil rights petitions by state prisoners in federal court increased from 218 cases in 1966 to 11,195 in 1979. *Id.*, at 6. See also the Annual Report of the Director of the Administrative Office of the U. S. Courts 62 (1980), reporting a further increase in this number to 12,397 in 1980. The societal costs of using this statute for a purpose never contemplated are high indeed:
>
> "First, the existence of the statutory cause of action means that every expansion of constitutional rights [through § 1983] will increase the caseload of already overburdened federal courts. This increase dilutes the ability of federal courts to defend our most significant rights. Second, every [such] expansion . . . displaces state lawmaking authority by diverting decision-making to the federal courts." Whitman, *supra*, at 25.
>
> The present case, involving a $23 loss, illustrates the extent to which constitutional law has been trivialized, and federal courts often have been converted into small-claims tribunals. There is little justification for making such a claim a federal case, requiring a decision by a district court, an appeal as a matter of

> right to a court of appeals, and potentially, consideration of a petition for certiorari in this Court. It is not in the interest of claimants or of society for disputes of this kind to be resolved by litigation that may take years, particularly in an overburdened federal system that never was designed to be utilized in this way.

451 U.S. at 554-55 n.13 (Powell, J., concurring).

The court's holding below is patently unfair and unwarranted. It turns time-honored trial practice principles upside down and affords to inmates an advantage not available to other civil litigants. He who has the burden must carry it. Prison officials must not be forced to prove their "innocence" simply because an inmate challenges the validity of a cell search by filing a complaint.

IV.

Assuming, *Arguendo*, That The Fourth Amendment Extends To A Prison Cell Search, The Search In Question Was Reasonable And Should Be Upheld.

As reflected in the District Court's opinion, the court accepted as true all of Palmer's allegations[1] and held that Palmer had failed to state a claim cognizable under 42 U.S.C. § 1983. (App. p. 33.) Accordingly, the parties had no occasion to present, and the District Court had no occasion to consider, evidence of legal authorities regarding the applicability of the Fourth Amendment to a prison cell search. Nonetheless, this Court should not hesitate to uphold the search in question.

[1] In his *pro se* complaint, Palmer alleged that during a shakedown search of his cell Hudson had destroyed certain items of personal property, that Hudson had brought a false charge against him before the prison disciplinary committee, and that Hudson had engaged in a pattern of harassment against him, as evidenced by the first two allegations.

The essential purpose of the Fourth Amendment is to impose a standard of "reasonableness" on the actions of governmental officials in order to insure the individual's legitimate expectations of privacy and the security of the individual against capricious invasions. *Camara* v. *Municipal Court*, 387 U.S. 523 (1967). Thus, if the Amendment is extended to prisoners, the propriety of prison officials' actions is measured by balancing the invasion of an inmate's Fourth Amendment interests against the promotion of legitimate governmental interests. *Bell* v. *Wolfish*, 441 U.S. 520 (1979); *Delaware* v. *Prouse*, 440 U.S. 648 (1979).

No decision of this Court suggests that a search conducted in a prison should be gauged by the same standards as one conducted in the "free world." Indeed, in *Bell* v. *Wolfish* this Court only assumed—but did not decide—that both convicted prisoners and pretrial detainees retain some Fourth Amendment rights when committed to a correctional facility. Nevertheless, in that case, the Court approved both room searches and body cavity searches of pretrial detainees. The Court held that significant and legitimate institutional security interests outweighed the privacy interests of the inmates. Furthermore, the Court recognized the inherent necessity of rational security measures in prisons to combat the smuggling of money, drugs, weapons and other contraband. 441 U.S. at 559.

In fact, the Fourth Circuit's decision in the instant case recognizes and adopts the position taken by the Court in *Bell*, 441 U.S. at 557, that irregular, unannounced shakedown searches of prison property are permissible, for they are an effective way of insuring that inmates do not possess contraband. (App. p. 42.) The Fourth Circuit's decision further recognizes that "[b]ecause of the legitimate demands of prison security, and to a lesser extent a prisoner's dimin-

ished expectation of privacy, neither a warrant nor probable cause is a prerequisite to a search or seizure in prison." (App. p. 42) (footnote omitted). The court concluded that "the device [of employing random individual searches] is of such obvious utility in achieving the goal of prison security that we do not think that the risk [of harassment] outweighs the benefit." (App. p. 43) (footnote omitted). In light of the court's own language, it is difficult, at best, to understand how the court reached the conclusion it did.

This Court has recognized the security considerations peculiar to prisons in other cases. The Court has held that courts must heed the warning that "[s]uch considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Pell* v. *Procunier*, 417 U.S. 817, 827 (1974). "The federal courts do not sit to supervise state prisons, the administration of which is of acute interest to the States." *Meachum* v. *Fano*, 427 U.S. 215, 229 (1976). Additionally, this Court has noted that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism." *Procunier* v. *Martinez*, 416 U.S. 396, 405 (1974).

As acknowledged by both this Court in *Bell*, 441 U.S. at 560, and the Fourth Circuit in this case (App. p. 42-43), valid security measures can be abused by prison officials to the detriment of inmates. Yet, the need to protect inmates from abuse does not warrant constitutional creativity of the magnitude engaged in by the Court of Appeals. A

remedy does not spring from the Fourth Amendment. Other remedies provide the needed protection.[8]

The governmental interest in prison security clearly outweighs any privacy interest an inmate might retain for Fourth Amendment purposes. Accordingly, the search in question was reasonable and should be upheld.

CONCLUSION

This Court has observed that whether an institution is called a "jail, a prison, or a custodial center, . . . [l]oss of freedom of choice and *privacy* are inherent incidents of confinement . . . ." *Bell* v. *Wolfish*, 441 U.S. at 537 (emphasis added). This solemn observation forms the very core of the central issue before this Court. When a person is confined for committing a crime, he surrenders his privacy.

This loss of privacy is not a matter of punishment. It is an imperative which stems from the interrelated correctional necessities of controlling and protecting inmates. Nothing less can effectively muzzle the predators and protect the prey. Nothing less can ameliorate the intrinsic dangers of prison life. Accordingly, it is now time for this Court to draw a "bright line" which will end the confusion among the lower courts; it is time for this court to hold that an inmate has no legitimate expectation of privacy in prison. The Fourth Amendment does not abide in a prison cell.

Furthermore, this Court should reject the ill-conceived notion that the Fourteenth Amendment contains a substantive right to privacy in the search and seizure context. Prior decisions of this Court provide no legal basis for such a novel constitutional doctrine.

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[8] *See* p. 18 n.4.

Additionally, even if the Court should find that a limited Fourth Amendment right to privacy exists under the circumstances of this case, the Court of Appeals was plainly wrong in holding that the burden of proof shifts to prison officials whenever an inmate questions the validity of a search. This holding flies in the face of the well-established principle that the person seeking redress initially carries the burden of proof. Such a holding should not be countenanced by this Court.

Likewise, if a limited Fourth Amendment right to privacy obtains in this case, in balancing the minimal privacy interests arguably retained by inmates against the governmental interest in maintaining security, the scales unquestionably tip in favor of prison security considerations.

Accordingly, the judgment of the Court of Appeals below was erroneous and must be reversed.

Respectfully submitted,

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Nos. 82-1630 and 82-6695

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TED S. HUDSON,

Petitioner,

v.

RUSSELL THOMAS PALMER, JR.,

Respondent,

and

RUSSELL THOMAS PALMER, JR.,

Cross-Petitioner,

v.

TED S. HUDSON,

Cross-Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR RESPONDENT AND CROSS-PETITIONER

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QUESTIONS PRESENTED

I.

Does a prison inmate have a reasonable expectation of privacy in prison so that he is entitled to the protection of the Fourth Amendment against unreasonable searches and seizures?[1]

II.

If the Fourth Amendment provides no reasonable expectation of privacy, may such an expectation be found in the general terms of the Fourteenth Amendment?

III.

Does the intentional deprivation of property by an official abuse of power constitute a due process violation notwithstanding the existence of state remedies?

IV.

Does the intentional deprivation of property by an official abuse of power constitute a due process violation when state relief is uncertain?

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[1] The Question Presented in the Petition for Writ of Certiorari was inaccurate in describing the search in this case as having been "for security purposes." This error was corrected by Petitioner in his Brief on Behalf of Petitioner, and the Question set forth above reflects this change.

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BRIEF FOR RESPONDENT AND CROSS-PETITIONER

OPINIONS AND JUDGMENTS BELOW

The Opinion of the United States District Court for the Western District of Virginia, Abingdon Division, entered November 17, 1981, is not reported and is included in the Joint Appendix at pages 28-34. The Opinion of the United States Court of Appeals for the Fourth Circuit, issued January 6, 1983, is reported as *Palmer* v. *Hudson*, 697 F.2d 1220 (4th Cir. 1983), and a copy appears at pages 36-44 of the Joint Appendix.

JURISDICTION

The jurisdiction of this Court is founded on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATUTE INVOLVED

Title 42 U.S.C. § 1983 [hereinafter also § 1983] provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

On September 28, 1981, Russell Palmer, Respondent and Cross-Petitioner [hereinafter also referred to as Respondent], brought a § 1983 suit against Ted S. Hudson, Petitioner and Cross-Respondent [hereinafter also referred to as Petitioner]. (App-6-10). Hudson was a guard at the prison in which Respondent Palmer was incarcerated. Palmer alleged that Petitioner Hudson conducted a destructive search of Palmer's room and locker for no purpose other than to harass and that during the search, Hudson destroyed Palmer's noncontraband personal property, including legal papers. (App-6-7 & 20-22). The value of the property was not alleged and is neither established nor suggested in the record. Palmer also alleged other forms of harassment by Hudson. (App-20-22).

On November 17, 1981, the United States District Court for the Western District of Virginia entered summary judgment against Palmer. In so doing, the district court accepted Palmer's allegations as true but held that the allegations failed to state a constitutional violation. (App-28-34).

Palmer timely appealed to the Fourth Circuit Court of Appeals, and the court of appeals appointed counsel for briefing and argument. On January 6, 1983, the court held that the intentional destruction of property for harassment did not violate due process assuming the existence of state tort remedies. The court further held that the allegation of a search and seizure for no purpose but to harass stated a possible Fourth Amendment violation, (App-36-44), and remanded the case to the district court.

On April 5, 1983, Hudson petitioned this Court for a Writ of Certiorari on the Fourth Amendment claim. On May 4, 1983, Palmer filed a Cross-Petition on the due process claim. On June 27, 1983, the Court granted a Writ of Certiorari as to all questions, together with leave for Palmer to proceed *in forma pauperis*.

SUMMARY OF ARGUMENT

When an official intentionally takes property, he must either have predeprivation authority or else have a legitimate excuse for the failure to acquire predeprivation authority. Because Petitioner Hudson had neither, the taking of Respondent Palmer's property violated due process whether or not state tort remedies were available. Further, even if the existence of state tort remedies were relevant to the due process determination in this case, postdeprivation relief in Virginia is uncertain, as the doctrine of sovereign immunity in Virginia forecloses many suits against state officials.

Furthermore, an intentional taking of an inmate's property for no legitimate purpose but in a wilfull abuse of power is a governmental act qualitatively different from an accidental loss of property. Whether or not it may be characterized as a random and unauthorized act, and whatever the impracticalities of a predeprivation hear-

ing, it is the type of conduct which the due process clause, the Fourteenth Amendment, and the civil rights acts were most directly designed to deter. Such a deprivation by Petitioner Hudson therefore at once violated Respondent Palmer's due process guarantee.

In addition to the due process guarantee, Petitioner Hudson's actions violated the distinct guarantee of the Fourth Amendment. The Fourth Amendment protects all persons against unreasonable searches and seizures. While the question of what is reasonable changes with the circumstances, and prison authorities are accorded wide latitude for the legitimate purpose of prison security, the search of an inmate's room and locker and destruction of his noncontraband property for the sole purpose to harass cannot be viewed as reasonable and thus violates the Fourth Amendment.[2]

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[2] Petitioner has addressed two additional questions: 1) whether the Fourth Circuit improperly placed the burden of proof; and 2) whether there is some privacy protection applicable to this case in addition to and apart from that provided by the Fourth Amendment as made applicable to the states by the Fourteenth Amendment.

The first of these questions was not presented to this Court in the Petition for Writ of Certiorari. Accordingly, Respondent will not address it except as it may pertain to the issues before the Court.

The second question, although contained in the Petition for Writ of Certiorari, is also not present in this case. Although Petitioner discusses the citation by the court of appeals of *Delaware* v. *Prouse*, 440 U.S. 648 (1979), as indicating recognition of a privacy right of the nature of *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), a contextual reading of the opinion below clarifies that the Fourth Circuit never so held.

ARGUMENT

I. PETITIONER HUDSON'S TAKING AND DESTRUCTION OF RESPONDENT PALMER'S PROPERTY VIOLATED DUE PROCESS.

A. An Official's Intentional, Unexcused Taking Of Property Without Predeprivation Process Violates Procedural Due Process Regardless Of Postdeprivation Remedies.

The due process clause of the Fourteenth Amendment guarantees that no state agent shall "deprive any person of life, liberty, or property, without due process of law. . . ."[3] This guarantee mandates predeprivation notice and opportunity to be heard. *Logan* v. *Zimmerman Brush Co.*, 445 U.S. 422, 428 (1982); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Process provided after the fact will not suffice. The taking remains unconstitutional because it was committed without authority of law.

> If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact

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[3] Property has never been slighted by this clause in deference to the other interests. To the contrary, property rights have been preeminent in the history of the due process clause. *See* G. DIETZE, IN DEFENSE OF PROPERTY (1963); *cf. Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226, 236 (1897) (recognizing that without protection of property all other rights would become worthless).

> that an arbitrary taking that was subject to the right of procedural due process has already occurred.

Fuentes v. *Shevin*, 407 U.S. 67, 81-82 (1972).[4]

This Court has recognized certain limited circumstances in which the government could not or should not be required to hold a hearing prior to the deprivation. *Parratt* v. *Taylor*, 451 U.S. 527 (1981).

> These cases recognize that either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process can, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, satisfy the requirements of procedural due process.

Id. at 539. Thus, no predeprivation hearing has been required in the case of an emergency involving public health, safety, or welfare. *See, e.g., North American Cold Storage Co.* v. *Chicago*, 211 U.S. 306 (1908) (seizing unwholesome food). Similarly, this Court has held that no predeprivation hearing is required when the "taking" is accidental and thus involves no actual decision to seize which could have been altered. *See Parratt* v. *Taylor*.

In determining the exceptions to the general prohibition against property seizure without previously obtained authority, the Court has undertaken a balancing of interests. In *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), this Court set forth the factors to be considered: 1) the private interest at stake; 2) the risk of erroneous deprivation and the value of additional procedures; and 3) the governmental interest at stake.

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[4] It is settled that this guarantee applies to those in as well as out of penal institutions. *See Parratt* v. *Taylor*, 451 U.S. 527 (1981); *Bell* v. *Wolfish*, 441 U.S. 520 (1979).

At times one or two factors alone can so tip the scales as to be dispositive. For example, in *Parratt*, the complete inability to achieve better results via predeprivation procedures together with the availability of state remedies compelled the conclusion reached in that case. Similarly in the present case, two of these factors are immediately dispositive. Petitioner seized and destroyed Respondent Palmer's personal, noncontraband property for no purpose but to harass. The interest of the government in such illegitimate, abusive seizures of property as in the present case is nonexistent. And the risk of erroneous deprivation can only be seen as approaching one hundred percent. Thus, whatever the value of Respondent's property, no exception to the ordinary due process guarantee can be justified under the *Mathews* v. *Eldridge* analysis and the summary deprivation by Petitioner Hudson violated due process.[5]

Because a guard bent on abusing his power will most likely not seek predeprivation authority for that abuse and harassment,[6] it might be argued that a requirement

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[5] Respondent Palmer readily recognizes that prison authorities are accorded a wide degree of latitude for the legitimate purpose of prison security. In his *pro se* complaint, he pleaded as follows: "Plaintiff realizes that routine shakedowns are necessary to properly run a prison, but he also knows they should not be used as harassment and retaliation." (App-21). Thus, were this case to involve contraband rather than legal, personal property, the analysis would be altogether different. In such a case, a guard would most likely have preestablished authority to seize. Moreover, a prisoner's legitimate interest would be absent while the government's interest in immediate seizure might be strong indeed.

[6] Presumably, a guard could acquire no valid authority for a purely harassing seizure of property. Thus requiring this step would be of enormous value in preventing the problem and achieving the result foreseen and intended by the due process clause. If, on the other

of predeprivation process is as impracticable in such a case as in the case of an accidental loss. However, this is not so. Because an officer in such a situation *can* provide predeprivation process, then as a matter of due process he must do so. If he declines, he acts at once unconstitutionally. The bad faith cannot be a factor allowed to render constitutional that which would be unconstitutional without it. *Screws* v. *United States*, 325 U.S. 91, 114 (1945) (Rutledge, J., concurring).[7]

Accordingly, the deliberate seizure by Petitioner Hudson of Respondent Palmer's property violated due process *despite the availability of postdeprivation remedies*. *See Logan* v. *Zimmerman Brush Co.*, 455 U.S. at 436. The due process violation was complete in the taking. "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." *Fuentes* v. *Shevin*, 407 U.S. at 82 (quotation omitted). Such remedies only become relevant once it has been concluded that summary deprivation is excusable for a legitimate purpose. Because no legitimate purpose could excuse the summary deprivation in this case, the question of postdeprivation remedies is never reached.

Neither *Ingraham* v. *Wright*, 430 U.S. 651 (1977), nor *Parratt* v. *Taylor*, 451 U.S. 527 (1981), stand for any

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hand, authority were granted for a harassment seizure, the problem would then lie with the source of that authority. *Cf. Bonner* v. *Coughlin*, 517 F. 2d 1311 (7th Cir. 1975), *mod. en banc*, 545 F.2d 565 (1976), *cert. denied*, 435 U.S. 932 (1978) (prison officials asserted in defense a procedure which they claimed allowed the actions there under challenge).

[7] In *Screws*, involving an action under another civil rights statute, the position was urged that because the act was murder, the matter should not be considered one of due process but rather should be confined to state courts. This position was repudiated.

contrary proposition. *Ingraham* involved the highly unique coupling of issues involving punishment[8] and public school children.[9] The procedure under challenge not only fell short of implicating a fundamental prohibition or even a common law tort, but to the contrary, it had constituted "a common-law privilege." 430 U.S. at 674. The Court could hardly have made clearer the historical influence on its decision. Because of corporal punishment's historical base, the child's liberty interest in avoiding corporal punishment has been limited. *Id.* at 675. This historical framework together with the openness of the school environment and the deterrences provided by state remedies led to the conclusion that "[t]he risk that a child will be paddled without cause is typically insignificant." *Id.* at 678; *cf. Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 435 (1982) (in which the system there under challenge was, by contrast, found to "present an unjustifiably high risk" of error). In light of these factors and the strong influence of history in this unique situation, due process was not violated by summary school paddlings. But the existence of state court remedies only entered the analysis in the Court's consideration of the risk of abuse and existing deterrence.

Moreover, *Ingraham's* reach quite clearly stops short of prison walls. The opinion itself says so, stating, "the

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[8] Cases questioning the degree of punishment have caused this Court considerable hesitation in other contexts. *See, e.g., Solem* v. *Helm*, 103 S. Ct. 3001 (1983).

[9] In the context of public schools, the Court has also noted deference. *See, e.g., Board of Curators of University of Missouri* v. *Horowitz*, 435 U.S. 78 (1978); *Goss* v. *Lopez*, 419 U.S. 565, 578 (1975) (dictum) ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . .", quoting *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968)).

prisoner and the schoolchild stand in wholly different circumstances. . . ." 430 U.S. at 669. Prisons are far from open. Accordingly, when the Court soon after addressed negligent deprivations of liberty in a jail context, *Ingraham* was not even cited. *See Baker* v. *McCollan*, 443 U.S. 137 (1979). In *Baker*, the question of the existence or not of postdeprivation remedies was, appropriately, confined to the status of speculation in dictum, since predeprivation process had been provided, albeit erroneously, through the warrant process. *Id.* at 142. Subsequently, in *Parratt* v. *Taylor*, 451 U.S. 527 (1981), the Court cited *Ingraham*, but only for the proposition that, "at some point the benefit of an additional safeguard to the individual affected . . . may be outweighed by the cost." 451 U.S. at 542-43 (quotations omitted). In *Parratt*, after concluding that no predeprivation authority could be required of a government in the case of an accidental loss, the Court then and only then, consistent with due process analysis, addressed the fact that the state of Nebraska presented completely adequate postdeprivation remedies for such a loss. 451 U.S. at 543-44.

Because in the present case there was an intentional, deliberate taking, a taking which involved a determination unlike the situation in *Parratt*, and because there was no legitimate justification for the taking without predeprivation process, the procedural due process guarantee of the Fourteenth Amendment was violated notwithstanding the existence of state remedies.[10]

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[10] It is certainly not true that a postdeprivation remedy as by suit for tort would necessarily compensate Respondent Palmer fully for his property loss any more than it could compensate him for lost days if unjustly imprisoned. The record reveals that, among the items taken, were Respondents's legal papers. (App-7 & 21). These may

B. Even If The Availability Of State Lawsuits Constitutes Due Process For Purposes Of An Official's Intentional Taking, Virginia Provides No Certain State Tort Remedy Against Officers For Losses They Cause.

This Court has recognized, *see Parratt* v. *Taylor*, 451 U.S. 527 (1981), that adequate state tort remedies may constitute postdeprivation process sufficient to meet the guarantees of the Fourteenth Amendment where there can be no predeprivation process.[11] However, in Virginia such relief is far from certain and complete.[12] Instead, the interpretations and applications of sovereign immunity, a doctrine not codified, are highly confused.

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have contained things irreplacable, and incompensable. They may have indirectly had a bearing on the duration of his loss of liberty. The property may also have involved sentimental items which are of equally intangible value. *See Bonner* v. *Coughlin*, 517 F. 2d 1311, 1314 (7th Cir. 1975) (discussing that the deprivation of legal documents could affect one's status as a prisoner and recognizing that prisoners may value items out of proportion to their actual price). Further, this Court has already recognized the injury from a due process violation itself as distinguishable from damages. *See Fuentes* v. *Shevin*, 407 U.S. 67, 81 (1972).

[11] This Court has recently noted that state tort law remedies are weak substitutes for predeprivation due process. *See Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 436-37 (1982). When it is considered that filing fees and service costs are generally required and that counsel is not generally available for those unable to hire counsel, *but cf.* VA. CODE ANN. § 14.1-183 (1978 Repl. Vol.) (granting the right to proceed *in forma pauperis* to those who qualify and have resided in the Commonwealth for six months), such state tort remedies become weak substitutes indeed. This conclusion is further compelled by the fact that a plaintiff in such a suit has the burden of proof. *See, e.g., Bedget* v. *Lewis*, 202 Va. 535, 118 S.E.2d 650 (1961).

[12] Section 8.01-195.1 *et seq.* of the Code of Virginia, enacted in 1982, does not remove sovereign immunity. Rather, it only abolishes to a limited degree the state's immunity while explicitly preserving the common law immunities of the government officials. Furthermore, it

In the recent case of *James* v. *Jane*, 221 Va. 43, 267 S.E. 2d 108 (1980), for example, the Virginia Supreme Court held that certain doctors at a state hospital were not immune from suit for their negligence. This conflicted with the earlier decision of *Lawhorne* v. *Harlan*, 214 Va. 405, 200 S.E.2d 569 (1973), which granted immunity from malpractice suits to a hospital administrator and intern because of their discretionary functions. This conflict resulted in a rare dissent by two justices who called for the overruling of *Lawhorne* v. *Harlan*. Yet *Lawhorne* was subsequently relied upon in *Banks* v. *Seller*, 224 Va. 168, 294 S.E.2d 862 (1982). There, because the duties of a school superintendent and principal involved a "considerable degree of judgment and discretion," *id.* at 173, 294 S.E. 2d at 865, the officers were immune from suit. This time three of the seven justices dissented on the basis that *Lawhorne* could not be reconciled with other decisions of the court. More recently, the court decided *First Virginia Bank-Colonial* v. *Baker, Clerk*, 225 Va. ____, 301 S.E. 2d 8 (1983). With a paucity of discussion, the court held that while a clerk is entitled to sovereign immunity for his discretionary acts, he is not immune on the basis of *respondent superior* for the acts of his deputy whether discretionary or ministerial.

Most recently, the court decided *Bowers* v. *Department of Highways*, 225 Va. ____, 302 S.E.2d 511 (1983). The court allowed the defendant in *Bowers* sovereign immunity from a suit for injuries caused by the defend-

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explicitly does not apply to claims accruing prior to 1982, and hence does not apply to this case. *See* VA. CODE ANN. § 8.01-195.1 *et seq.* (1983 Cum. Supp.). Virginia has obtained approval, as of December 14, 1982, of a plan pursuant to 42 U.S.C. § 1997(e) (Institutionalized Persons Act). That administrative plan does provide the possibility for a limited damage remedy for loss of property by prisoners.

ant's unauthorized work on the plaintiff's property. Again three justices dissented. Again the dissent pointed out that the case was irreconcilable with previous decisions. They stated, "This tendency of the majority to tiptoe around the fringes of sovereign immunity not only produces highly attenuated reasoning but leads to increasing uncertainty and confusion in the trial courts." 225 Va. at ____, 301 S.E. 2d at 516.

The only Virginia case to hold directly on the issue of sovereign immunity from intentional torts is *Elder* v. *Holland*, 208 Va. 15, 155 S.E. 2d 369 (1967), involving a claim of defamation in testimony. The language of the holding was simply the following:

> Having concluded that a State employee may [under certain circumstances] be held liable for negligent conduct, we must conclude that a State employee may be held liable for his intentional torts.

208 Va. at 19, 155 S.E. 2d at 372-73. This case has been cited for the proposition that there is no sovereign immunity for intentional torts.[13] However, whether the phrase "may be held liable" could have meant, as it did in the court's preceding reference to negligent conduct, only the possibility of liability under certain circumstances rather than a blanket rule is unknown. The court did proceed to grant the defendant a qualified immunity in the absence of a strong showing of actual malice.

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[13] A number of lower federal courts, including the district court in this case, have interpreted Virginia law as having no sovereign immunity for intentional torts. *See, e.g., Frazier* v. *Collins*, 538 F. Supp. 603 (E.D. Va. 1982); *Whorley* v. *Karr*, 534 F. Supp. 88 (W.D.Va. 1981); *Daughtry* v. *Arlington County, Va.*, 490 F. Supp. 307 (D.D.C. 1980). These cases have relied on *Elder* v. *Holland* for this proposition.

While it is possible if not probable that a Virginia trial court would rule that there should be no immunity bar in the present case, such an outcome is simply uncertain, and any contrary ruling would have little chance of reversal because of the absence of an appeal of right in Virginia. Moreover, as discussed, the law is even more uncertain in the realm of negligent acts. Accordingly, in the Commonwealth of Virginia, state tort law remedies cannot be relied upon to provide adequate postdeprivation process.[14]

C. The Due Process Clause Of The Fourteenth Amendment Protects Against Deprivations By Abuse Of Official Power.

The principle that persons should be protected from arbitrary and abusive governmental action is the cornerstone of free society. It lies at the very heart of the Fourteenth Amendment's due process guarantee, *see*,

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[14] As Justice Powell noted in *Parratt* v. *Taylor*, 451 U.S. at 550-51, allowing the question of a due process violation to depend on the existence of state lawsuit remedies can lead to truly anomalous results. In fact, for Virginia claims, the principle of avoiding the use of § 1983 as a substitute for state tort law, *see, e.g., Paul* v. *Davis*, 424 U.S. 693 (1976) (eschewing such use), is turned on its head. For in Virginia, because sovereign immunity deprives persons of fair compensation in many otherwise meritorious cases involving negligently inflicted injuries, *see Lawhorne* v. *Harlan*, 214 Va. 405, 200 S.E. 2d 569 (1973), claims which might otherwise present mere ordinary torts become due process violations. Even if the foreclosure of state tort remedies by immunity doctrines and other defenses does not alone constitute a due process violation, *see Martinez* v. *California*, 444 U.S. 277 (1980), certainly such doctrines remove the last vestige of apparent due process sufficiency where a state deprives one of property without preseizure authority.

An analysis of Virginia law also leads to the anomalous due process result that negligent deprivations such as by medical malpractice

e.g., *Home Telephone and Telegraph Co.* v. *Los Angeles*, 227 U.S. 278 (1913), as it does of the civil rights acts provided to enforce that guarantee, *Monroe* v. *Pape*, 365 U.S. 167 (1961).

> [T]he [Fourteenth] Amendment, looking to the prevention . . . of the wrongs which it prohibits, proceeds . . . upon the assumption that . . . state powers might be abused by those who possessed them, and as a result might be used as the instrument for doing wrongs. . . .

Home Telegraph and Telegraph Co. v. *Los Angeles*, 227 U.S. at 288. Thus, "protection of the individual against arbitrary action of the government" is the "touchstone of due process." *Wolff* v. *McDonnell*, 418 U.S. 539, 558 (1974); *cf. Kolender* v. *Lawson*, 103 S. Ct. 1855, 1859 (1983) (vague statute enabling arbitrary use of power held unconstitutional).

This guarantee, so fundamental that it is the only guarantee of the Bill of Rights not left to implication in the Fourteenth Amendment, stems from no less a source than the Magna Carta, *Bank of Columbia* v. *Okely*, 4 Wheat. (17 U.S.) 235, 244 (1819); A. HOWARD, THE ROAD FROM RUNNYMEDE (1968). Its protection is the core of ordered liberty.

> A government which recognized no such rights [against arbitrary and capricious power], which held

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would be more likely to violate due process because of the immunity protecting such acts of state employees, *see Lawhorne* v. *Harlan*, whereas intentional acts such as those involved in *Screws* v. *United States*, 325 U.S. 91 (1945), would less violate the federal Fourteenth Amendment guarantee of due process because Virginia would be more likely to provide a remedy without an immunity bar, *see Elder* v. *Holland*. Of course, this very result was addressed and repudiated by a majority of the Court in *Screws* as well as in *Monroe* v. *Pape*, 365 U.S. 167 (1961).

> the lives, the liberty, and the property of its citizens subject at all times to the absolute despotism and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority . . . but it is none the less a despotism.

Loan Association v. *Topeka*, 20 Wall. (87 U.S.) 655, 662 (1874). Thus, this principle easily meets the test of "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," *Palko* v. *Connecticut*, 302 U.S. 319, 328 (1937) (quotation omitted), and partakes of the substantive nature of the guarantees intended by the Fourteenth Amendment.

Because of the close connection between the civil rights acts and the guarantees of the Fourteenth Amendment which the acts were designed to enforce, this principle that persons should be free from deprivations as a result of a state official's abuse of power has often been addressed in terms of the purpose of § 1983. *See, e.g., Monroe* v. *Pape*, 365 U.S. 167 (1961). However, § 1983 is but a remedy for the violation of those rights guaranteed by the Constitution or by statute. *E.g., Lugar* v. *Edmondson Oil Co.*, 102 S. Ct. 2744 (1982). Thus, this Court's recognition that the civil rights acts were aimed specifically at abuse of power, *see, e.g., Briscoe* v. *Lahue*, 103 S. Ct. 1108 (1983) (dictum); *Monroe* v. *Pape; Screws* v. *United States*, 325 U.S. 91 (1945) (majority of the Court), necessarily subsumed this principle within the Fourteenth Amendment.

Recognition that federal courts are charged with the duty of preventing through § 1983 abuses of state power as violative of federal constitutional guarantees was most notably canvassed in the watershed decision of *Monroe* v. *Pape*, 365 U.S. 167 (1961). *Monroe* involved random and

unauthorized abuses[15] by thirteen Chicago policemen. More specifically,

> [t]he complaint allege[d] that 13 Chicago police officers broke into petitioner's home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers. It further allege[d] that Mr. Monroe was then taken to the police station and detained on "open" charges for 10 hours, while he was interrogated about a two-day-old murder, that he was not taken before a magistrate, though one was accessible, that he was not permitted to call his family or attorney, that he was subsequently released without criminal charges being preferred against him.

Id. at 169. The question was squarely put: "whether Congress, in enacting [§ 1983], meant to give a remedy to parties deprived of constitutional rights . . . by an official's abuse of his position." It was as squarely answered: "We conclude that it did so intend." *Id.* at 172.

Monroe solidified the principle that federal courts are guardians against abuses of power by state officials.

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is

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[15] Neither *Ingraham* v. *Wright*, 430 U.S. 651 (1977), nor *Parratt* v. *Taylor*, 451 U.S. 527 (1981), involved claims challenging directly an abuse of power. In *Ingraham*, no teachers were defendants; in *Parratt*, the culprit, if any, was unknown. A random and unauthorized abuse of power does not necessarily render a procedure unconstitutional if the risk of abuse is low and the procedure otherwise satisfactory. *Compare Ingraham* v. *Wright* (low risk of abuse) *with Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 435 (1982) ("an unjustifiably high risk" of error). *See generally Lugar* v. *Edmondson Oil Co.*, 102 S. Ct. 2744 (1982) (recognizing the distinction between claims against procedures and those against persons misusing procedures).

> supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.

Id. at 183; *accord Patsy* v. *Board of Regents*, 102 S. Ct. 2557 (1982).[16]

Recognition of this principle was, of course, established not long after the passage of the Fourteenth Amendment, *see, e.g., Ex Parte Virginia*, 100 U.S. 339, 346-47 (1880), and had been applied in cases preceding *Monroe*. *Screws* v. *United States*, 325 U.S. 91 (1945), for example, likewise involved a random and unauthorized act, the beating to death of a black man by police officers. A majority of the Court concluded that *the beating violated "the right not to be deprived of life without due process of law"*. *Id.* at 93. This was so whether or not a predeprivation hearing could have realistically been expected. In fact, the question never entered the analysis. The state officers argued that, because the act constituted murder under state law, and thus there was a state remedy for the act, the abuse of power should not implicate any federal guarantee. *Id.* at 114. Justice Rutledge put this argument in proper prospective. He stated in concurrence:

> In effect, the position urges it is murder they have done, not deprivation of constitutional right. Strange as the argument is the reason. It comes to this, that abuse of state power creates immunity to federal power. Because what they did violated the state's

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[16] While in *Monroe* v. *Pape*, as in the present case, abusive action may at times also implicate the Fourth Amendment, it will not always do so. The withholding of entitlements, for example, for an abusive purpose might implicate the due process clause but not the Fourth Amendment. *Cf. Hewitt* v. *Helms*, 103 S. Ct. 864 (1983) (acknowledging a prisoner's due process liberty guarantee as distinct from a Fourth Amendment guarantee).

> laws, the nation cannot reach their conduct. . . . This, though the prime object of the Fourteenth Amendment and [the civil rights act] was to secure these fundamental rights against wrongful denial by exercise of the power of the states.

Id. (footnote omitted). As he then pointed out, such an argument had been long rejected. "The [Fourteenth] Amendment and the [civil rights] legislation were not aimed at rightful state action. *Abuse of state power was the target.*" *Id.* at 115 (emphasis added).

The concept that persons should be free from abuse of power as guaranteed by the due process clause and enforced by § 1983 has reverberated through many recent decisions of this Court, *see, e.g., Baker* v. *McCollan*, 443 U.S. 137 (1979) (concurring and dissenting opinions); *Parratt* v. *Taylor*, 451 U.S. 527 (1981) (concurring opinions), and has been explicitly acknowledged in others, *see e.g., Briscoe* v. *Lahue*, 103 S. Ct. 1108, 1118 (1983) (dictum) (that § 1983 is "a section designed to provide remedies for abuses under color of law.").[17]

In *Parratt* v. *Taylor*, for example, numerous separate opinions were inspired by the absence of an intentional taking. Three Justices specifically addressed the fact that "there are certain governmental actions that, *even if undertaken with a full panoply of procedural protections*, are, in and of themselves, antithetical to fundamental notions of due process." 451 U.S. at 545 (Blackmun, J., joined by White, J., concurring) (emphasis added). Justice Powell explained further, "The Due Process Clause imposes substantive limitations on state action,

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[17] This concept, though in other form, is inherent in decisions addressing qualified, "good faith" immunity. *See, e.g., Wood* v. *Strickland*, 420 U.S. 308 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974).

and under proper circumstances these limitations may extend to intentional and malicious deprivations of liberty and property. . . ." *Id.* at 552-53 (Powell, J., concurring). This limitation stems from the fact that the Constitution protects against deprivations "by a state officer *who takes . . . by abuse of his office and its power.*" *Id.* (quoting *Screws* v. *United States*, 325 U.S. 91, 134 (1945) (Rutledge, J., concurring)) (emphasis by Powell, J.); *cf. Carlson* v. *Green*, 446 U.S. 14 (1980) (recognizing the importance of deterring abuses of power through a "*Bivens*" action).[18]

Thus, whether considered a matter of substance or procedure, the due process clause, in conjunction with the civil rights legislation designed to enforce the Fourteenth Amendment, protect a citizen from deprivation of life, liberty, or property by an official abusing his power. The Fourteenth Amendment and § 1983 protect him as fully against such abuse as it protects his right of privacy, *see Griswold* v. *Connecticut*, 381 U.S. 479 (1965), his access to the courts, *see Bounds* v. *Smith*, 430 U.S. 817 (1977), and other fundamental rights. Because without this protection all other rights may be abused, it is perhaps the most fundamental protection of all.[19]

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[18] In *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), the Court allowed an action against federal officers similar to an action under § 1983 even though § 1983 was itself inapplicable to the federal officials.

[19] Most scholars appear to agree that federal courts ought to maintain power over abuses by state officials. *See, e.g.*, Friedman, *Parratt v. Taylor: Opening and Closing the Door on Section 1983*, 9 HASTINGS CONST. L. Q. 545 (1982); Note, *Defining the Parameters of Section 1983: Parratt* v. *Taylor*, 23 B. C. L. REV. 1219 (1982); Note, *Due Process and Section 1983: Limiting Parratt* v. *Taylor to Negligent Conduct*, 71 CALIF. L. REV. 253 (1983).

In the present case, Petitioner Hudson deprived Respondent Palmer of his personal, noncontraband property for no legitimate purpose. He sought only to harass, which he was able to do by virtue of his position and its power. He thus abused his power and in so doing denied Respondent Palmer of the right to have due process prior to losing his property and, by the very nature of the act, violated the due process clause of the Fourteenth Amendment.

II. PETITIONER HUDSON'S TAKING AND DESTRUCTION OF RESPONDENT PALMER'S PROPERTY VIOLATED THE FOURTH AMENDMENT

In *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), this Court observed that there is "no iron curtain drawn between the Constitution and the prisons of this country." *Id.* at 555-56. Earlier in the same term, the Court recognized that "when a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Procunier* v. *Martinez*, 416 U.S. 396, 405-06 (1974).

While constitutional guarantees apply in and out of prison, the Constitution creates few interests which are absolute. *See, e.g., Pell* v. *Procunier*, 417 U.S. 817 (1974) (press interviews prevented in prison); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942) (fighting words exemption to free speech). The Fourth Amendment is no exception. It protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." U.S. CONST. amend. IV. The guarantee, made applicable to the states through the Fourteenth Amendment, *e.g., Duncan* v. *Louisiana*, 391 U.S. 145 (1968), and applying to all "people", only addresses searches and seizures which are unreasonable.

"[A]nalysis under the Fourth Amendment is always the reasonableness in all the circumstances of a particular governmental invasion of a citizen's personal security." *Pennsylvania* v. *Mimms*, 434 U.S. 106, 109 (1977) (quotations omitted); *accord Florida* v. *Royer*, 103 S. Ct. 1319 (1983) (all opinions). In turn, "[r]easonableness . . . depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference. . . ." *Pennsylvania* v. *Mimms*, 434 U.S. at 109 (quotation omitted); *accord Bell* v. *Wolfish*, 441 U.S. 520, 559 (1979).

It follows therefore that when a person is lawfully arrested his privacy interest "is subordinated to [the] legitimate and overriding governmental concern [of law enforcement]." *United States* v. *Robinson*, 414 U.S. 218, 237 (1973) (Powell, J., concurring). Similarly, when a person is legally incarcerated, his privacy interest and the extent of his protection against searches and seizures lessen. But this is not so because jails or prisons are places unprotected. *Katz* v. *United States*, 389 U.S. 347 (1967) (overruling *Olmstead* v. *United States*, 277 U.S. 438 (1928), in which Fourth Amendment guarantees were based on physical location). The Constitution protects people, not places. *Id.* Rather, this is so because prison administrators are accorded "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell* v. *Wolfish*, 441 U.S. at 549; *accord Hewitt* v. *Helms*, 103 S. Ct. 864 (1983).

Consequently, the range of searches and seizures which are reasonable for purposes of the Fourth Amendment prohibition increases dramatically in a prison setting, and a prisoner's reasonable expectation of privacy in

his cell, locker, personal effects is proportionately reduced. Irregular, unannounced shakedowns may be permissible. *Bell* v. *Wolfish* at 555-57. Even body cavity searches without probable cause may be reasonable. *Id.* Yet because they are reasonable, such expansive searches and seizures are permitted *within* the framework of the Fourth Amendment, not in derogation of it.

While the range of acts which might be considered reasonable for the sake of prison security may be quite broad, it does not entirely command the field: a prisoner remains protected against searches and seizures which are *unreasonable*. *Stroud* v. *United States*, 251 U.S. 15 (1919) (by necessary implication); *cf. United States* v. *Edwards*, 415 U.S. 800, 808 n.9 (1974) (dictum) (for pretrial detainees); *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974) (a prisoner retains those First Amendment rights which are not "inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections systems.")[20]

In the present case, Petitioner Hudson conducted a ransacking search of Respondent's room and locker and destroyed Respondent's personal, noncontraband property. (App-7-8, 21, & 29). He did so for no legitimate

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[20] Most circuits appear to agree. *See United States* v. *Hinckley*, 672 F. 2d 115 (D.C. Cir. 1982); *United States* v. *Lilly*, 576 F. 2d 1240 (5th Cir. 1978); *United States* v. *Stumes*, 549 F. 2d 831 (8th Cir. 1977); *Sostre* v. *Preiser*, 519 F. 2d 763 (2d Cir. 1975); *Bonner* v. *Coughlin*, 517 F. 2d 1311 (7th Cir. 1975), *mod. en banc*, 545 F. 2d 565 (1976), *cert. denied*, 435 U.S. 932 (1978); *United States* v. *Savage*, 482 F. 2d 1371 (9th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974); *Daughtery* v. *Harris*, 476 F. 2d 292 (10th Cir. 1973), *cert. denied*, 414 U.S. 872 (1973). *But see Christman* v. *Skinner*, 468 F. 2d 723 (2d Cir. 1972); *United States* v. *Hitchcock*, 467 F. 2d 1107 (9th Cir. 1972), *cert. denied*, 410 U.S. 916 (1973).

purpose but only to harass Respondent. If any search and seizure in prison can be deemed unreasonable, this is it. In order to be reasonable, a search and seizure must "serve[ ] legitimate governmental interests that outweigh[ ] the individual's privacy interests. . . ." *Illinois* v. *Lafayette*, 103 S. Ct. 2605, 2610 (1983). Because a seizure designed only to upset Respondent serves no legitimate purpose, then whatever can be said of the reasonableness of security searches in prisons without warrants, shakedowns without probable cause, even body cavity searches without probable cause, the search and seizure in this case was unreasonable. From such abuses, if only from such abuses, the Fourth Amendment protects.

Nor does analysis under the rubric of expectations of privacy lead to a contrary conclusion concerning continued Fourth Amendment protection in prison. Because one's expectation of privacy is viewed objectively, rather than subjectively, *see Smith* v. *Maryland*, 442 U.S. 735, 740 (1979); *United States* v. *Dionisio*, 410 U.S. 1, 14-15 (1973), the question of one's expectation of privacy is but the opposite side of the question of reasonableness of the intrusion. *See* Giannelli & Gilligan, *Prison Searches and Seizures: "Locking" the Fourth Amendment out of Correctional Facilities*, 62 VA. L. REV. 1045, 1058-63 (1976), *cited in Palmer* v. *Hudson*, 697 F. 2d 1220, 1224 n. 4 (4th Cir. 1983). If random cell searches for contraband are clearly reasonable, a prisoner cannot have an objective privacy interest which would be infringed thereby. However, because searches and seizures to harass are unreasonable, a prisoner has a reasonable expectation of privacy not to have his cell, locker, personal effects, person invaded for such a purpose.

Because the search and seizure in this case was so clearly unreasonable, Petitioner's only position can be —

and is — that there is indeed an "iron curtain" around prisons. Petitioner advocates a "bright line" approach. Brief on Behalf of Petitioner at 14. He thus invites the Court to discard its previous endeavors at the more subtle, albeit more difficult, balancing of constitutional protections and governmental interests in favor of a blanket ban on this fundamental protection against unreasonableness for those in prison. While such a line may be bright indeed for an abusive prison guard, it would certainly be less so for his prisoners.

More importantly, this Court has already declined this offer. Though "straightforward rule[s]" are desirable, *New York* v. *Belton*, 453 U.S. 454, 459 (1981), any straightforward exceptions to the normal probable cause, warrant requirements are "jealously and carefully drawn". *Katz* v. *United States*, 389 U.S. 347, 357 (1967); *accord Terry* v. *Ohio*, 392 U.S. 1, 20 (1968); *Camara* v. *Municipal Court*, 387 U.S. 523, 528 (1967); *Florida* v. *Royer*, 103 S. Ct. 1319 (1983) (plurality). A guiding rule is a far cry from banishment of Fourth Amendment protection altogether, and a balancing of interests with reasonableness as the polestar remains the basis of Fourth Amendment analysis. *See, e.g., Florida* v. *Royer*.

Further, as early as 1919, the Court, in *Stroud* v. *United States*, 251 U.S. 15, appropriately assumed without much ado the Fourth Amendment's application in the prison context, although the government action in that case was "reasonably designed to promote the discipline of the institution," and thus was constitutional. *Id.* at 21. The Court's efforts in *Bell* v. *Wolfish*, 441 U.S. 520 (1979), if not explicitly recognizing a prisoner's Fourth Amendment interest, certainly would appear to refute any argument that this Court is willing to sweep unnecessarily broadly in such areas for the sake of simplicity. *Cf.*

United States v. *Edwards*, 415 U.S. 800, 808 n. 9 (1974) (dictum) (stating that police conduct must still meet the Fourth Amendment's reasonableness standard in post-arrest detention). Rather than a "bright line" approach,

> the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness.

Terry v. *Ohio*, 392 U.S. 1, 17-18 n.15 (1968).

Even if this Court were otherwise inclined and prepared to draw a "bright line" around prisons for purposes of the Fourth Amendment, the Court has recognized rehabilitation as a legitimate penological objective. *See Procunier* v. *Martinez*, 416 U.S. 396 (1974). This objective is misserved by any greater degree of degradation by lack of privacy than is necessary to serve other penological objectives, such as security. Giannelli & Gilligan, *supra*, at 1069. "Without the privacy and dignity provided by fourth amendment coverage, an inmate's opportunity to reform, as small as it may be, will further be diminished." *Id.*

Furthermore, such a "bright line" would effectively place an entire realm of official conduct beyond the reach of federal review. *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974). An overriding purpose of the Fourth Amendment is to guarantee against arbitrary searches and seizures, for which reason this Court has previously condemned unfettered discretion as pertains thereto. *See, e.g., United States* v. *Ortiz*, 422 U.S. 891, 896 (1975); *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 270 (1973). Yet precisely such unreasonable, abusive, arbitrary searches

would be allowed without any constitutionally imposed limitation by the adoption of such a "bright line". The Constitution itself creates no such exemption from its protection, and this Court should not now read into it any such exemption but rather should adhere to the "sounder course" of recognizing the continued existence of the Fourth Amendment within prisons, though continuing to recognize that the range of reasonable conduct may broaden therein.

Accordingly, no "bright line" around prisons should now be adopted and the decision of the Fourth Circuit Court of Appeals recognizing the continued existence of the Fourth Amendment in the prison context and its possible violation in this case should be affirmed.

CONCLUSION

An official's intentional taking and destruction of a prisoner's property for no legitimate purpose but only to upset and harass violates the due process clause of the Fourteenth Amendment which protects against deprivations without predeprivation process and which protects against abuses of power.

Furthermore, an official's search of a prisoner's room and locker and destruction of his property for no legitimate purpose but only to harass is unreasonable. Thus it violates the Fourth Amendment prohibition against such searches and seizures.

Accordingly, the decision below that Petitioner's actions did not violate due process should be reversed, and

the holding that the Fourth Amendment may have been violated should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TED S. HUDSON,
Petitioner,

v.

RUSSELL THOMAS PALMER, JR.,
Respondent.

and

RUSSELL THOMAS PALMER, JR.,
Cross-Petitioner,

v.

TED S. HUDSON,
Cross-Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF FOR CROSS-PETITIONER

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REPLY BRIEF FOR CROSS-PETITIONER

SUMMARY OF ARGUMENT

Petitioner's[1] entire position rests upon a total distinction for purposes of the Fourteenth Amendment between acts which are authorized by state law and intentional acts which are not authorized but are misuses of state power. Petitioner asserts that the due process clause is not implicated by the latter acts, for which acts state remedies are assumed. This distinction has long ago been rejected by the Court, the Court holding that the primary focus of the Fourteenth Amendment and the civil rights acts was precisely such abuse of power, and the existence of state remedies is irrelevant.

Petitioner's position is, furthermore, equally unsound today. The argument that possible compensation through state tort remedies for property taken by an official's abusive action constitutionalizes such wrongful action denigrates the Constitution's intended structure between citizen and state agent. It also allows for the arbitrary, abusive exercise of state power immune from federal review.

Finally, Petitioner's position would also undermine Congress' salutary efforts through 42 U.S.C. § 1997 *et seq.*

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[1] Petitioner and Cross-Respondent Hudson will hereinafter also be referred to simply as Petitioner, and Respondent and Cross-Petitioner Palmer will hereinafter also be referred to simply as Respondent.

ARGUMENT

A DELIBERATE DEPRIVATION BY A STATE OFFICIAL WITH NEITHER PRIOR PROCESS NOR JUSTIFICATION FOR THE FAILURE TO PROVIDE PRIOR PROCESS VIOLATES THE DUE PROCESS CLAUSE AT ONCE.

I. This Court Has Long Ago Rejected The Distinction Between Authorized And Unauthorized Official Action Upon Which Petitioner Rests His Contention That State Tort And Criminal Remedies Supply Due Process.

Petitioner's entire argument depends upon a complete distinction for purposes of constitutional protection between acts which are matters of established state procedure and those which are instead random and unauthorized. *See* Reply Brief on Behalf of Petitioner and Cross Respondent [hereinafter Reply Brief] at 2, 4, 5, 6, 7, 8, & 10. He argues that this distinction is decisive because in the former case a state has control over its agents, and in the latter it does not[2]; and because in the former case, the state's action will be complete, whereas in the latter

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[2] The act in this case was random only in that it was unauthorized. *Cf. Parratt* v. *Taylor*, 451 U.S. 527 (1981) (involving random deprivation in the sense used by the Court the year before in *Martinez* v. *California*, 444 U.S. 277 (1980), which involved the random killing by a nonofficial as a result of some remote official involvement.) In *Parratt*, as in *Ingraham* v. *Wright*, 430 U.S. 651 (1977), suits were brought against supervisory officials for what amounted to failure to have prevented a loss or abuse, and the analysis necessarily involved the practical ability of these officials to have prevented the loss through their policies. However, in the present case there is absolutely nothing in the record demonstrating inability to have controlled this guard. This is not in the record in part because no one but the guard himself has been sued, and thus the question of

situation, state tort or criminal action can yet be had.[3] Thus, he argues, where the violation is a matter of established state procedure, a deprivation may instantaneously violate due process but in the case of an unauthorized act it cannot.[4]

This distinction, upon which Petitioner's entire position depends, has been thoroughly repudiated by this

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control was truly immaterial. *Cf. Parratt* v. *Taylor* (suit against prison head, who had nothing personally to do with loss); *Ingraham* v. *Wright* (school officials sued, not abusive teachers); *Martinez* v. *California* (parole board sued, not murderer). *See generally Rizzo* v. *Goode*, 423 U.S. 362 (1976) (recognizing significant difference in suing offenders and suing those who have not somehow prevented offense). *See also Lugar* v. *Edmondson Oil Co*, 457 U.S. 922 (1982) (recognizing two separate types of due process claims: those against state procedures; and those against officials who abuse procedures).

[3] Petitioner quotes at length on this point from the Seventh Circuit's decision in *Bonner* v. *Coughlin*, 517 F.2d 1311 (7th Cir. 1975), *mod. en banc*, 545 F.2d 565, *cert. denied*, 435 U.S. 932 (1978). *See* Reply Brief at 5. However, as persuasive as that reasoning may be when applied to a loss or negligent action truly incapable of predeprivation process, the case did not address and did not purport to address intentionally abusive official action. *Kimbrough* v. *O'Neil*, 545 F.2d 1059 (7th Cir. 1976) (en banc).

[4] Petitioner assumes the existence of state remedies, in some form, from the fact that the act was unauthorized. Where no such remedies exist, however, Petitioner's position leads inescapably to the conclusion that a loss in an automobile accident or by a computer error, when an officer happens to be at fault, stands on equal constitutional footing with a willful abuse of power as that by a destruction of property under pretense of law in reckless disregard or open defiance of constitutional rights, as in this case.

Court. *E.g.*, *Monroe* v. *Pape*, 365 U.S. 167 (1961). This very distinction, and its entourage of purported justifications Petitioner asserts in connection therewith, were urged, and rejected, in *Screws* v. *United States*, 325 U.S. 91 (1945). There the Court held that the deprivation of life by officers effecting an arrest not only violated due process at once but was sufficient "open defiance", *id.* at 105, of constitutional rights that criminal prosecution for the due process violation was appropriate. In an argument familiar to this case, Petitioner Screws urged that, because the act was unauthorized and, in fact, violated state law, there was no due process violation. Justice Rutledge, concurring, addressed the argument as follows:

> [T]he position urges it is murder they have done, not deprivation of constitutional right. Strange as the argument is the reason. It comes to this, that abuse of state power creates immunity to federal power. Because what they did violated the state's laws, the nation cannot reach their conduct. This, though the prime object of the Fourteenth Amendment and [the civil rights acts] was to secure these fundamental rights against wrongful denial by exercise of the power of the states.

Id. at 114; *accord Monroe* v. *Pape*, 365 U.S. at 172.

From the Court's decision in *Ex Parte Virginia*, 100 U.S. 339 (1880), to that in *Monroe* v. *Pape*, *inter alia*, the law is settled that the act of an official which is made possible by virtue of his position *is* the act of the state. Such officials "carry a badge of authority of a State and represent it in some capacity whether they act in accordance with their authority or misuse it." *Id.* at 172. Such unauthorized acts are the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law. . . ." *United States* v. *Classic*, 313 U.S. 299, 326 (1941); *accord*

Ex Parte Virginia, 100 U.S. at 346. They are acts under "pretense of law", *Screws*, 325 U.S. at 111, and are prohibited by the Fourteenth Amendment regardless of state remedies. *Id.*; *Monroe* v. *Pape*; *cf. Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971) (state remedies irrelevant to Fourth Amendment question).

Thus, whether the intentional deprivation is the result of an isolated, impromptu policy of a sheriff or prison guard or is a matter of such broader application and duration as a state law makes no difference to the Fourteenth Amendment protection. *Screws*. Indeed, unlike the case of an established state procedure, which is the result of deliberative, legislative action and which is open for all to see, *cf. Ingraham* v. *Wright*, 430 U.S. 651 (1977) (openness reduces risk of abuse), and immediately challengeable if offensive to the Constitution, it is in the former situation, involving day to day operations of a sheriff, magistrate, policeman, prison guard, where abuse is most likely to occur and where the Fourteenth Amendment protection becomes all the more important. Consequently, it is precisely such lawless acts, such abuses of power and not the lawful exercise of power, which the Fourteenth Amendment and § 1983 were most specifically designed to prevent and deter. *E.g.*, *Monroe* v. *Pape*; *Screws*; *cf. Briscoe* v. *Lahue*, 103 S.Ct. 1108, 1118 (1983) (dictim) (civil rights acts aimed at abuse of power).

Accordingly, the basic distinction upon which Petitioner's position rests has been long and solidly rejected by this Court.[5]

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[5] While an intentional deprivation without prior process and without any constitutionally acceptable excuse for the failure to provide prior process will implicate the due process clause, *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), the degree to which the deprivation was or

II. Petitioner's Position That State Remedies Should Constitutionalize An Official's Abusive Deprivation Would Upset The Critical Relationship Between Citizen And Government Which The Constitution Was Intended To Secure.

a. *Petitioner's position fails to recognize the important difference between an act by an official armed with the power of the state and the same act by a civilian.*

By urging that state tort remedies are sufficient process in the case of an intentional taking, Petitioner in this case, as the government in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971),

> seek[s] to treat the relationship between a citizen and a [governmental] agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, [it] ignore[s] the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting—albeit unconstitutionally—in the name of the [government] possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.

Id. at 391-92.

Nothing is more central to our "framework of ordered liberty," *Kolender* v. *Lawson*, 103 S.Ct. 1855, 1858 (1983), than the interrelationship between citizen and state agent. Because of the greater strength of the state,

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was not authorized might, of course, enter the analysis of good faith immunity. Thus, an intentional deprivation based on a reasonable belief, judged objectively, that the taking was permissible and constitutionally authorized might bar recovery. *See Procunier* v. *Navarette*, 434 U.S. 555 (1978).

the Constitution provides barriers specifically designed to limit an officer's power against a citizen.

> [T]he type of harm which officials can inflict when they invade protected zones of an individual's life are different from the types of harm private citizens inflict on one another. . . . The injuries inflicted by officials acting under color of law . . . are substantially different in kind . . ."

Bivens, 403 U.S. at 408-09 (Harlan, J., concurring); *accord, e.g., Monroe* v. *Pape*, 365 U.S. 167, 196 (1961) (Harlan, J., concurring). The Constitution recognizes this difference, and § 1983 provides for redress of official acts above and beyond remedies possibly available in state court. *Monroe* v. *Pape*.[6]

The Constitution offers extra protection when an officer seeks to enter a home because an officer requesting entry simply stands in a position altogether different from that of a neighbor requesting the same. *Bivens*. Thus, though a neighbor may only trespass, an officer's unlawful entry offends the Constitution.

Similarly, as in the present case, when an officer is put in a position by the state to destroy a man's property, as

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[6] Negligent deprivations do not implicate this relationship. An officer who negligently damages or deprives is not doing so by use of the power of the state, is not doing so under "pretense of law", *Screws* v. *United States*, 325 U.S. 91, 111 (1945), whether authorized or unauthorized. Thus, an automobile accident is no more under pretense of law because the driver happens to be wearing a uniform than when he happens not to be, nor is a computer error or an accidental loss of a package in the mail any more a use of the power of the state when attributable to officials than when attributable to anyone. In such cases, the deprivation is *despite* the badge not *because* of it. Such acts are thus significantly different from acts which are in "open defiance" or in "reckless disregard" of constitutional rights. *Id.* at 105.

by being made a prison guard, the deliberate use of that power in the illegitimate destruction of property is not just conversion or trespass; it is a breach of the due process clause which stands as a barrier between the officer and an individual's life, liberty, and property. *Cf. Kolender* v. *Lawson* (the due process clause prohibits the arbitrary exercise of power). Such injuries, which should be "compensable according to uniform rules of federal law," *Bivens*, 403 U.S. at 409 (Harlan, J., concurring), are thus subject to constitutional correction, to a declaration that what has been done violates the supreme laws of this country. To conclude that state remedies for conversion and trespass are sufficient, as if the act had been committed by a civilian neighbor, is to denigrate this long-recognized constitutional structuring and intent.[7]

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[7] Rather than a "vast majority" of decisions favoring Petitioner's position as Petitioner asserts, *see* Reply Brief at 7, the cases seem at most evenly divided. Petitioner has evidently missed a few decisions and circuits. *See, e.g., Clark* v. *Taylor*, 710 F.2d 4 (1st Cir. 1983); *McCoy* v. *Gordon*, 709 F.2d 1060 (5th Cir. 1983); *Weiss* v. *Lehman*, 676 F.2d 1320 (9th Cir. 1982); *Hirst* v. *Gertzen*, 676 F.2d 1252 (9th Cir. 1982); *Wright* v. *Dallas County Sheriff Dept.*, 660 F.2d 623 (5th Cir. 1981); *Madyun* v. *Thompson*, 657 F.2d 868 (7th Cir. 1981); *cf. Burtnieks* v. *City of New York*, 716 F.2d 982 (2d Cir. 1983) (discussing *Parratt* v. *Taylor* as based on negligence); *Jackson* v. *City of Joliet*, 715 F.2d 1200 (7th Cir. 1983) (noting that, if due process is not provided, "it makes no difference whether the State hangs you or has you shot down in the street by a police officer"); *State Bank of St. Charles* v. *Camic*, 712 F.2d 1140 (7th Cir. 1983) (*Parratt* applied to "simple negligence" case). *See generally Languirand* v. *Hayden*, 717 F.2d 220, 224 n.6 (5th Cir. 1983) (expressing inability to predict *Parratt's* application if any beyond facts of *Parratt*). *See also* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 26.14 (1982 Supp.) ("The weakness in the proposition that an intentional taking is not unconstitutional on account of the later remedy is that at the moment when

b. ***Petitioner's position leaves state officials open to arbitrary, abusive action assuming the officials are willing to risk eventual repayment of the precise monetary value of what they take.***

Overlooking the difference in official and civilian conduct, Petitioner's argument concludes that, so long as Palmer could, through suit in state court, recover the property or receive the monetary value of property that was taken from him, the due process guarantee is not implicated.[8] The facts that Palmer *might* be able to sue in state court for a violation of state law,[9] *and* be able to carry his burden of proof that his property is his own, *and* be able to collect from the guard the monetary value of the property destroyed, *and* accomplish all of this within a period of several years depending on the congestion of a court's docket and the strategies of those such as the

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the property is taken, the official has violated the Constitution and the later remedy cannot change that fact.")

Lower court language in support of Petitioner's position is often more an incorrect attempt to apply *Parratt* v. *Taylor* than the result of any independant reasoning. *See Palmer* v. *Hudson*, 697 F.2d 1220 (4th Cir. 1982); *Tydings* v. *Department of Corrections*, 714 F.2d 11 (4th Cir. 1983) (case governed by *Palmer's* interpretation of *Parratt*); *id.* (Fairchild, J., sitting by designation, concurring only because of stare decisis in the Fourth Circuit).

For perhaps one of the most thorough and carefully reasoned post-*Parratt* decisions, see *Begg* v. *Moffitt*, 555 F.Supp. 1344 (N.D. Ill. 1983).

[8] If the due process clause meant no more than this, it is curious why the Founding Fathers thought it necessary to add that property cannot be taken for public use without just compensation. *See* U.S. CONST. amend. V.

[9] There is no evidence that Respondent knew of any state tort remedies.

Attorney General who might be defending the guard, these together present the sum and substance, so says Petitioner, of our due process guarantee against intentional, abusive, unauthorized actions by state officials.

To adopt the position that the due process inquiry is complete upon the availability of compensation would mean that a state or local official *by use of government power* may snatch away property without any valid or even arguably valid authority and, though he may have to return the property, thumb his nose at the United States Constitution and the federal courts, both powerless to touch him.

Such a position would mean that when a man takes a walk down his neighborhood street to visit the corner grocery, the Constitution provides him no protection against a uniformed officer who calls him over and tears off his coat, snatches his hat, or dumps out the goods he has bought, and only because the officer did not like the man or the way the man dressed, did not like the color of the man's skin or did not like the man's political affiliation. *But see Kolender* v. *Lawson*, 103 S.Ct. 1855 (1983). Such a position would accomplish what every state is prohibited from doing by statute, allowing "policemen . . . to pursue their personal predelictions." *Id.* at 1858-59 (quoting *Smith* v. *Goguen*, 415 U.S. 566, 575 (1974)). So long as the man could file suit in state court for the value of the groceries, the constitutional duty of the state would be complete and such misuse of power and deprivation of liberty and property would not implicate the due process clause and would be immune from federal review.

Even more, the very moment the victim of such abuse emerges from the state courthouse having prevailed, if he is lucky, in proving that the officer had no right to take the goods and that they should be returned, the very same

officer could snatch them away again on the courthouse steps; and the whole lengthy suit process could but begin all over again, all without the availability of federal court review, all without any constitutional protection, all without any assurance that the victim of such abuse could ever stop such actions. For though a state *might* provide disincentives for such repeat offenses or some form of injunctive relief, the requirement for such remedies is, under Petitioner's argument, no longer of federal concern. Even if Palmer could recover the value of his property in a state court tort suit, the fate of his request for injunctive relief, his first request (App-8 & 22), would be, under Petitioner's position, irrelevant to any federal court.

Clearly, it was precisely such abusive intrusions into a person's life which the due process clause and § 1983 were most specifically designed to prevent. The abusive, arbitrary, illegitimate exercise of governmental power resulting in the deprivation of life or liberty or property violates due process at once. Accordingly, the abusive destruction by Guard Hudson deprived Palmer of property without due process.

III. Petitioner's Position Would Misserve Congress' Express Purposes For Enacting § 1997, To Cure Institutional Abuses And To Stem The Resilting Tide Of Prison Litigation.

In addition to urging that persons subjected to deprivation in a misuse of state power must look to state courts for redress, Petitioner refers the Court to prison grievance procedures. Both parties agree that the recent procedures adopted recently by Virginia and certified pursuant to the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 *et seq.*, are not applicable to this case. *See* Reply Brief at 13 n. 14. Guard Hudson destroyed Palmer's property on September 16, 1981, this action was

begun September 28, 1981, and the new grievance procedures were not in effect until over a year later.[10]

Yet the passage of § 1997 is significant to the due process issue before the Court in that the Act and the concerns which prompted its passage would be undermined by Petitioner's position. The history surrounding the Act makes clear that Congress sought to improve the conditions in our states' prisons.

> Congress hoped that § 1997e would improve prison conditions by stimulating the development of successful grievance mechanisms.

Patsy v. *Board of Regents*, 457 U.S. 496, 511 (1982). In particular Congress sought to cure abuses which Congress believed to be in violation of the Constitution and thus redressable under § 1983. *See, e.g.*, § 1997a; § 1997b; § 1997c; H.R.REP. NO. 897, 96th Cong., 2d Sess. (1980).

To effect this cure, the United States Attorney General was granted authority to initiate actions in cases involving denials of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States. § 1997a. Moreover, Congress encouraged the states to adopt meaningful, standardized grievance procedures by the incentive of a unique exhaustion requirement for prisoner § 1983 litigation in states with such procedures. § 1997e.

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[10] Petitioner does suggest that Petitioner should have used the then-existing grievance procedures. However, in addition to other deficiencies in those old procedures, they did not even pretend to provide compensation for property destroyed.

By procuring through this incentive the adoption by the various states of more meaningfully corrective grievance procedures, the Act also serves the stated goal of curbing the proliferation of prisoner § 1983 suits. *See* H.R.REP. No. 897, 96th Cong., 2d Sess. 9 (1980). It was Congress' studied determination that such thorough grievance procedures would serve to reduce the incidence of institutional abuse, and complaints concerning such abuses would have a more realistic chance of being resolved administratively to a prisoner's satisfaction. Thus, § 1983, which would continue to be available to redress such abuses, would be less used because less needed.

> The effect of (§ 1997) would be to secure basic legal and constitutional rights for institutionalized persons, and to assist in relieving the caseloads of Federal courts in prisoner petitions.

Id.

The present case illustrates this potential impact. Even before seeking damages, Palmer sought correction of the oppressive situation. He sought to have his oppressor, Guard Hudson, removed. Prospective relief was his primary goal. (App-8 & 22). Had an effective, meaningful grievance procedure then been in effect, the abuses by Guard Hudson might have been taken more seriously by the prison officials and Hudson might have been removed or relocated if the allegations were verified. While such procedures do not render an abusive deprivation any less a due process violation, and thus it remains Congress' intent under the Act that Palmer could still proceed into federal court under § 1983 were he to choose to do so, his main object would have been fulfilled and this suit might never have been brought.

However, the linch-pin of this entire legislative program is Congress' belief and assumption that the abuses

to be curbed by the certified grievance procedures and to be cured by federal intervention are of *constitutional* dimension. All provisions carry the same language as that of § 1983 itself, in addressing only violations of constitutional or federal statutory rights. Indeed, it was upon such an assumption that Congress based its authority, upon § 5 of the Fourteenth Amendment. 125 CONG. REC. 12,491 (1979) (remarks of Rep. Drinan).

Thus, for this Court to hold that such abuses as that by Guard Hudson do not implicate the rights, privileges, and immunities of the Constitution, and thus to relegate prisoners instead to possible recollection of property value in state court, would both misserve Congress' purposes and gut the Act itself. The abusive conditions found by Congress to exist in many of our state's prisons and mental institutions would only worsen because a powerful deterrence, for which § 1983 was intended, *e.g.*, *Smith* v. *Wade*, 103 S.Ct. 1625 (1983), would be removed. Further, states would lose their "incentive to adopt grievance procedures capable of certification because prisoner § 1983 cases could be diverted", in this case forever, "to state . . . remedies in any event." *Patsy* v. *Board of Regents*, 457 U.S. at 511-12. Thus, the Commonwealth of Virginia might not only be the *first* state to obtain such certification, it might well be the *last*. Finally, the United States Attorney General would remain, despite Congress' efforts and intent, powerless to correct such abuses even where rampant, because his enforcement power is tied to constitutional violations.

Accordingly, Congress' goals in enacting § 1997, and its own belief that deprivations from abusive treatment by the misuse of power violate the Fourteenth Amendment and that relegation to state courts for such prisoners is an

insufficient remedy, should be given persuasive weight in this Court's consideration of this issue.

CONCLUSION

For the reasons stated herein, together with the reasons set forth in the Brief for Respondent and Cross-Petitioner, the decision below as it pertains to the due process claim should be reversed.

Respectfully submitted,

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Nos. 82-1630 and 82-6695

In The

Supreme Court of the United States

October Term, 1983

TED S. HUDSON,
v. *Petitioner,*
RUSSELL THOMAS PALMER, JR.,
Respondent.

and

RUSSELL T. PALMER, JR.,
v. *Cross Petitioner,*
TED S. HUDSON,
Cross Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF ON BEHALF OF PETITIONER AND CROSS RESPONDENT

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QUESTIONS PRESENTED

1. Does a prison inmate have a reasonable expectation of privacy in prison so that he is entitled to the protection of the Fourth Amendment against unreasonable searches and seizures?
2. If a prisoner, in the context of a prison search, is not protected by the specific terms of the Fourth Amendment, can such protection be found under the general terms of the Fourteenth Amendment?
3. Does the intentional deprivation of property resulting from a random, unauthorized act of a state employee constitute a due process violation when the state provides an adequate postdeprivation remedy?

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF ON BEHALF OF PETITIONER AND CROSS RESPONDENT

ARGUMENT

I.

A RANDOM, UNAUTHORIZED, YET INTENTIONAL DEPRIVATION OF PROPERTY BY A STATE EMPLOYEE DOES NOT VIOLATE THE OWNER'S RIGHT TO DUE PROCESS WHEN THERE EXIST ADEQUATE POSTDEPRIVATION STATE REMEDIES.

A.

Introduction

This case presents the Court with the opportunity to "once more put [its] shoulder to the wheel," *Parratt* v. *Taylor*, 451 U.S. 527, 533 (1981), and set to rest for the

lower courts the question whether the rationale and holding of *Parratt* apply to intentional deprivations of property occasioned by the random and unauthorized acts of state employees.[1]

The cross petitioner, Palmer, contends (1) that an unexcused, intentional taking of property without predeprivation process violates the Fourteenth Amendment even if adequate postdeprivation state remedies exist, (2) that, under Virginia law, the availability of postdeprivation state remedies against state employees is uncertain and (3) that the Due Process Clause protects against deprivations resulting from an abuse of official power.

The cross respondent, Hudson, contends that the reasoning and holding of *Parratt* control the disposition of this aspect of this case and the Court of Appeals below so agreed. Where property loss results from random and unauthorized conduct of state employees, whether intentional or negligent, an adequate postdeprivation state remedy satisfies the requirements of due process. Because Virginia provides several adequate postdeprivation remedies to inmates such as Palmer, Hudson's conduct did not deprive Palmer of property without due process of law. Accordingly, under the facts of this case, the court below properly affirmed the dismissal of Palmer's claim in this regard.[2]

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[1] This brief will address issues involved in both cases, Nos. 82-1630, in which Hudson is petitioner, and 82-6695, in which Hudson is cross respondent.

[2] In his *pro se* complaint, Palmer alleged that during a shakedown search of his locker, Hudson had destroyed certain items of personal property, that Hudson had brought a false charge against him before the prison disciplinary committee, and that Hudson had engaged in a pattern of harassment against him as evidenced by the first two allegations. For purposes of ruling on Hudson's motion for summary judgment, the district court accepted as true all of Palmer's allegations and held that he had failed to state a claim cognizable under 42 U.S.C. § 1983. (App. at 33).

B.

The Rationale Of *Parratt v. Taylor* Controls The Disposition Of This Case.

In *Parratt*, a Nebraska prison inmate, suing pursuant to 42 U.S.C. § 1983, claimed that state prison officials deprived him of property without due process of law by their negligent loss of his hobby kit. This Court first determined that § 1983 does not contain a state of mind requirement and, therefore, suits alleging negligent conduct of state officials are not excluded from the ambit of a § 1983 action. 451 U.S. at 535.

The Court then focused on the elements of a valid due process claim. Those requirements are (1) action under color of state law, (2) the taking of property and (3) the failure to afford an appropriate procedure capable of providing a remedy in a meaningful manner and at a meaningful time. In considering these factors, the Court found in *Parratt* that the prison officials acted under color of state law; the hobby kit fell within the definition of property; and the alleged loss, even though negligently caused, amounted to a deprivation of property. *Id.* at 536. But, focusing upon the last element, the Court held that the provision of a meaningful postdeprivation state remedy satisfied the requirements of due process. *Id.* at 541. It followed then that the guard's negligent conduct did not violate the inmate's constitutional right to due process.

In considering the last element, the Court in *Parratt* recognized that its Fourteenth Amendment cases have squarely rejected the proposition that due process *always* requires the state to provide a hearing prior to the initial deprivation of property.[8] *Id.* at 540. The Court

[8] Cross petitioner's contrary assertion that the Fourteenth Amendment mandates predeprivation notice and opportunity to be heard,

found that Nebraska provided a postdeprivation remedy through its tort claims act, and this remedy was available to the prisoner. The Court then directed its inquiry to whether, under the facts of that case, the Due Process Clause required a predeprivation hearing for a random taking of property. Upon consideration of the practical inability of the state to control all employee misconduct, the Court found that a postdeprivation remedy, such as the Nebraska tort claims procedure, was adequate to satisfy due process requirements where random and unauthorized conduct caused the loss. *Id.* at 541.

In distinguishing its line of cases requiring a predeprivation hearing, the Court reasoned that:

> The justifications which we have found sufficient to uphold takings of property without any predeprivation process are applicable to a situation such as the present one involving a tortious loss of a prisoner's property as a result of a random and unauthorized act by a state employee. *In such a case, the loss is not a result of some established state procedure and the State cannot predict precisely when the loss will occur. It is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place. The loss of property, although attributable to the State as action under "color of law," is in almost all cases beyond the control of the State.* Indeed, in most cases it is not only impractical, but impossible, to provide a meaningful hearing before the deprivation.

Id. (emphasis added). Under the facts of *Parratt*, the due process requirement of a meaningful hearing at a meaningful time was satisfied by the post deprivation remedy.

In formulating its decision in *Parratt*, this Court substantially adopted the language and analysis of then Judge

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Brief for Palmer at 5, is, as *Parratt* indicates, simply at odds with this Court's decisions.

Stevens in *Bonner* v. *Coughlin*, 517 F.2d 1311 (7th Cir. 1975), *modified en banc*, 545 F.2d 565 (1976), *cert. denied*, 435 U.S. 932 (1978), where he stated:

> It seems to us that there is an important difference between a challenge to an established state procedure as lacking in due process and a property damage claim arising out of the misconduct of state officers. In the former situation the facts satisfy the most literal reading of the Fourteenth Amendment's prohibition against "State" deprivations of property; in the latter situation, however, even though there is action "under color of" state law sufficient to bring the amendment into play, *the state action is not necessarily complete.* For in a case such as this the law of Illinois provides, in substance, that the plaintiff is entitled to be made whole for any loss of property occasioned by the unauthorized conduct of the prison guards. We may reasonably conclude, therefore, that *the existence of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment.*

517 F.2d at 1319 (emphasis added) (footnotes omitted).

The reasoning and holding of *Parratt* were confirmed by this Court in *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982). In *Logan*, the Court found a due process violation when the terms of an Illinois statute deprived an individual of the opportunity to pursue an employment discrimination claim. The Court emphasized that the Fourteenth Amendment requires only an opportunity for a hearing appropriate to the nature of the deprivation at a meaningful time and in a meaningful manner. *Id.* at 437. In an opinion consistent with *Parratt*, Justice Blackmun wrote for the Court that a deprivation of property resulting from a state procedure, rather than from the random and

unauthorized action of a state employee, requires a pre-deprivation hearing, regardless of the availability of post-deprivation remedies. *Id.* at 435.

Turning to the case at hand, Palmer contends that *Parratt* is not applicable to this case because the facts in *Parratt* involved a negligent deprivation of property and not an intentional taking. Although the alleged existence of Hudson's intent is a distinction between the claim presented by Palmer and the claim in *Parratt*, it is a difference without substance.

The analysis in *Parratt* applies equally to intentional and negligent deprivations of property that implicate due process guarantees. The due process analysis undertaken in *Parratt* did not involve consideration of the presence or absence of intent. 451 U.S. at 534-35. The holding in *Parratt* simply makes no distinction between negligent property deprivations and intentional torts. The ultimate inquiry must focus, not on whether there was a deprivation of property, but on whether the established deprivation of property was without due process of law. *Id.* at 537. A taking resulting from negligence is no less a deprivation to the owner than one resulting from intentional action. And a taking resulting from intentional action does not deprive the owner of more than does a taking resulting from negligence. The ultimate issue, as suggested above, is whether the owner was afforded a meaningful hearing at a meaningful time.

The state is just as unable to control an employee's random and unauthorized, intentional misconduct as it is an employee's negligent misconduct. It is this inability to control and prevent the random, wrongful act that justifies the conclusion that the provision of a postdeprivation remedy avoids the unconstitutional taking without process.

Clearly, the measure of the employee's act on a scale of negligence is immaterial. The key is *whether the state's action is complete. Bonner,* 517 F.2d at 1319. In situations in which the state has provided meaningful post-deprivation remedies, the state conduct is not complete upon the conclusion of the isolated, random, unauthorized misconduct of an employee. Thus, because due process is provided at a meaningful time, there is not a constitutional deprivation of property without due process of law.

Further support for the application of the *Parratt* doctrine to intentional torts is found in the Court's reliance in *Parratt* upon its decision in *Ingraham* v. *Wright,* 430 U.S. 651 (1977). *Parratt* cites with approval the *Ingraham* holding that intentional deprivations of liberty caused by corporal punishment in public schools do not violate the Fourteenth Amendment because postdeprivation state common-law remedies were sufficient to satisfy due process requirements. 451 U.S. at 543 (citing *Ingraham,* 430 U.S. at 682). After specifically recognizing *Ingraham* as an intentional tort case, the Court in *Parratt* cited that decision without qualification as consistent with its *Parratt* analysis. 451 U.S. at 542.

If the Court had wished to limit the holding of *Parratt* to torts resulting only from negligence, it certainly had the opportunity to do so. The Court's failure to so limit *Parratt* and its reliance upon *Ingraham* strongly suggest that *Parratt* is applicable to cases such as the one now before the Court. Moreover, the vast majority of United States Courts of Appeals that have touched upon this issue have found *Parratt* applicable to intentional as well as negligent conduct.[4] Those courts have found no logical reason for

[4] *Wolf-Lillie v. Sonquest,* 699 F.2d 864 (7th Cir. 1983); *Palmer v. Hudson,* 697 F.2d 1220 (4th Cir. 1982); *Engblom v. Carey,* 677 (footnote continued)

restricting the doctrine in *Parratt* to negligent conduct only.

The few courts restricting *Parratt* to cases alleging only negligent conduct often cite Justice Blackmun's concurring opinion in *Parratt* for the proposition that meaningful post-deprivation remedies are not adequate in cases alleging intentional deprivation of property by state employees.[5] Justice Blackmun did clearly express the concern that the *Parratt* holding should not be automatically extended to property losses resulting from a state official's intentional acts. He most assuredly did not, however, foreclose the possibility of such an extension in those situations in which the state was unable to control the isolated, random, unauthorized acts of the employee. *See Parratt*, 451 U.S. at 545-46 (Blackmun, J. concurring). The applicability of *Parratt* must be gauged by the facts presented. It is respectfully suggested that Justice Blackmun's opinion requires no more.[6]

F.2d 957 (2d Cir. 1982); *Rutledge v. Arizona Board of Regents*, 660 F.2d 1345 (9th Cir. 1981); *see Wolf-Lillie v. Sonquiest*, 699 F.2d 864 (7th Cir. 1983) (Sheriff's conduct was arguably intentional deprivation of property); *cf. Burtnieks v. New York*, No. 82-7733 (2d Cir. Aug. 26, 1983) (available Nov. 1, 1983, on WESTLAW, FED database) (if intentional taking made predeprivation hearing impractical, *Parratt* can apply); *Coleman v. Faulkner*, 697 F.2d 1347 (10th Cir. 1982) (*Parratt* applicable to intentional seizure of money, but not necessarily for other intentional deprivations). *Contra Brewer v. Blackwell*, 692 F.2d 387 (5th Cir. 1982). In *Brewer*, the Fifth Circuit attempted to draw a distinction between negligent property deprivations and those involving intentional acts. Yet the court did not provide any persuasive reasoning, only stating the conclusion that negligent property deprivations are somehow quantifiably different from intentional takings.

[5] *See, e.g., Brewer v. Blackwell*, 692 F.2d 387, 394 (5th Cir. 1982).

[6] Also implicit in Justice Blackmun's concurring opinion is the suggestion that the state should not take comfort in *Parratt* and be less vigorous in deterring unauthorized conduct. In this regard, it is important to note that Palmer does not even intimate that the state acquiesced in Hudson's conduct.

Palmer seeks to avoid the *Parratt* analysis in this case by contending that a predeprivation hearing is not impossible because the intentional tort-feasor knows he is going to destroy the property prior to the destructive act. Brief of Palmer at 8. By arguing that a predeprivation hearing is possible, he concludes that predeprivation process is required. It is, however, both naive and illogical to suggest that the employee who intends to commit an unauthorized and wrongful act is bound to provide a hearing before he commits such an act.[7]

Parratt rests upon a practical, realistic understanding of the functioning of government. Palmer simply ignores that foundation. Furthermore, *Parratt* recognizes that the process due by virtue of the Fourteenth Amendment is owed by the *state*, not by a state employee. 451 U.S. at 541.

In the analysis chosen by the Court, it found as dispositive whether the taking was a result of random and unauthorized misconduct or of conduct pursuant to established state procedure. *Id.* at 541. While the Court provides no specific definition of "random and unauthorized conduct," its parameters can be discerned from examining the facts and rationale underlying *Parratt*. In that case,

[7] Significantly, Palmer admits that it is unlikely that a predeprivation hearing would be given by a state employee who intends to commit a random and unauthorized act. Brief of Palmer at 7-8. Yet, he submits such process is mandated by the Fourteenth Amendment simply because it is theoretically possible. This academic argument has been specifically addressed and rejected by the Court on numerous occasions. In *Arnett v. Kennedy*, 416 U.S. 134 (1974), the Court found constitutionally adequate the post-discharge remedies afforded a terminated civil service employee. Moreover, in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court held that social security benefits could be terminated even though the only opportunity for a hearing came after the benefits stopped. In those cases, a hearing prior to termination was arguably possible, but the mere possibility was substantially outweighed by its impracticality, the marginal reduction of improper actions which would result, the significant intrusion involved, and the sufficiency of remedies that already existed.

the loss of the prisoner's property resulted from the negligent conduct of state employees. Because the loss was not the result of a state procedure, the Court found that "the state cannot predict precisely when the loss will occur," *id.*, and noted that it would be difficult to conceive of how the state could thus provide a meaningful predeprivation hearing. *Id.*

Applying the *Parratt* analysis to the present case will yield the same conclusion. The intentional taking claimed by Palmer was totally unpredictable by the state because the alleged conduct was not in accordance with any procedure or direction by the state, was unforeseeable and beyond the control of official action.[8] (App. at 7-8). Officer Hudson's alleged misconduct of destroying Palmer's property was just as unauthorized, unpredictable, and beyond the control of the state as the negligent conduct of *Parratt*.

Consequently, *Parratt* dictates that a meaningful postdeprivation remedy was all that the state could reasonably be expected to provide Palmer and, therefore, all that the Fourteenth Amendment required. It follows that if Virginia law provides a meaningful postdeprivation remedy, then Palmer has not been deprived of his property without due process of law within the meaning of the Fourteenth Amendment.

C.

Virginia Law Provides Adequate Postdeprivation Remedies.

That Virginia provides adequate procedures and remedies for the conduct alleged cannot be seriously questioned. As

[8] The Virginia Department of Corrections, *Employee Standards of Conduct* (July 1, 1981), provide that abuse of inmates by Department employees is an offense of such a serious nature that a first occurrence should normally warrant removal from employment. Add. at 1.

noted by the United States District Court below, adequate state remedies were available through the common-law actions for conversion or detinue.[9] (App. at 31). *See Irshad* v. *Spann*, 543 F. Supp. 922 (E.D. Va. 1982). In addition, Palmer had an adequate remedy available under the then applicable inmate grievance procedure of the Virginia Department of Corrections.[10] *See Phelps* v. *Anderson*, 700 F.2d 147 (4th Cir. 1983). Because these remedies could have fully compensated him, Palmer was provided with process sufficient to meet the guarantees provided in the Fourteenth Amendment.[11]

Palmer, on the other hand, claims that relief is "uncertain" in state courts because the defense of sovereign immunity "may" be available to state employees charged with intentional torts. Brief for Palmer at 11-14.[12] This

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[9] Virginia law permits indigents to proceed *in forma pauperis* in court actions without paying fees or costs and gives courts the authority to assign counsel in such cases. Va. Code § 14.1-183 (1978).

[10] It is of interest that Palmer did not seek to avail himself of any of these remedies. Instead, within two hours of being served by Hudson with notice he, Hudson, was charging Palmer with infraction of a prison rule, Palmer completed a *pro se* complaint which he executed and eleven days later filed in United States District Court. See Palmer's § 1983 complaint (App. at 8), which was executed on September 17 and refers to Hudson's conduct at 10:00 p.m. that day.

[11] In addition to these remedies, Virginia now has a State Tort Claims Act, Va. Code §§ 8.01-195.1 to -195.8 (Supp. 1983), which waives the sovereign immunity of the Commonwealth in certain situations.

[12] To support this proposition, Palmer cites *Banks v. Sellers*, 224 Va. 168, 294 S.E.2d 852 (1982); *First Virginia Bank-Colonial v. Baker*, 225 Va. ____, 301 S.E.2d 8 (1983); and *Bowers v. Department of Highways*, 225 Va. ____, 302 S.E.2d 511 (1983). Significantly, none of these cases involved an intentional tort as does the present case. *Banks* dealt with an allegation that a school principal negligently failed to provide a safe environment for a student. *Bowers* involved a claim of negligent construction of a culvert (footnote continued)

argument fails to acknowledge settled Virginia law. The Supreme Court of Virginia and each federal court in Virginia considering the issue have uniformly held that sovereign immunity is not a bar to recovery from state employees accused of intentional torts.

In *Elder* v. *Holland*, 208 Va. 15, 155 S.E.2d 369 (1967), the Supreme Court of Virginia held that a state police officer could not claim sovereign immunity as a defense to a claim of liability for defamatory words spoken while performing his duties. In so holding, the court said, "we must conclude that a State employee may be held liable for intentional torts." 208 Va. at 19, 155 S.E.2d at 372-73.

Twelve years later, in *Short* v. *Griffitts*, 220 Va. 53, 255 S.E.2d 479 (1979), the Virginia Supreme Court was again faced with a claim of immunity in a negligence case. While that case is not directly on point, the court did take the opportunity to affirm its holding in *Elder*, stating that "[w]e concluded [in *Elder*] that a State employee was also liable for intentional torts." *Id.* at 56, 255 S.E.2d at 481. Based upon these holdings of the Supreme Court of Virginia, there is simply no confusion in Virginia law on this issue. Sovereign immunity is not available to bar recovery for an intentional tort.

The federal district courts applying Virginia law have consistently recognized that state employees are not immune from liability for intentional torts. *Irshad* v. *Spann*, 543 F. Supp. 922, 928 (E.D. Va. 1982) ("A State employee who acts intentionally . . . is not immune from liability in his individual capacity.")[13]; *Holmes* v. *Wampler*,

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and *First Virginia* concerned an allegation of misfeasance by a deputy court clerk for improperly indexing a lien instrument. Thus, they are not relevant to Palmer's assertion that the law concerning intentional tort-feasors is unclear.

[13] The court in *Irshad* interestingly notes that in § 1983 cases (footnote continued)

546 F. Supp. 500, 504 (E.D. Va. 1982) ("In Virginia, a state official does not enjoy immunity for an intentional tort"); *Frazier* v. *Collins*, 544 F. Supp. 109, 110 (E.D. Va. 1982) ("Virginia does not extend immunity to its officials...for intentional torts"); *Whorley* v. *Karr*, 534 F. Supp. 88, 89 (W.D. Va. 1981) ("Sovereign immunity protects no government official who commits an intentional tort.").

In addition to the state common law and statutory remedies, the Virginia Department of Corrections Inmate Grievance Procedure also provided adequate postdeprivation remedies to an inmate who had been deprived of property.[14] See *Phelps* v. *Anderson*, 700 F.2d 147 (4th Cir. 1983). The inmate grievance procedure allows the prisoner to grieve actions taken by prison officials and permits compensation for property destroyed through their misconduct. *See id.* at 149 n.5; *Irshad*, 543 F. Supp. at 927. In *Phelps* v. *Anderson* and in *Irshad* v. *Spann*, the courts found the grievance procedure to provide adequate due process under the standards of *Parratt* v. *Taylor*. They concluded that

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state officials are accorded a qualified good faith immunity from damages. Thus, a plaintiff suing a state official in a § 1983 case and alleging a deprivation of property without due process of law resulting from the employee's negligent action will probably be precluded from recovery because of the employee's good faith.

[14] Although not applicable to the loss alleged in this case, effective October 12, 1982, Virginia instituted an inmate grievance procedure certified by the Attorney General of the United States as being in compliance with the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997e (1976 ed, Supp. IV). *See Phelps* v. *Anderson*, 700 F.2d at 149, n.3. This certified procedure is essentially the procedure available to inmate Palmer at the time of his loss of property and provision is made for providing monetary relief as a potential remedy. *See generally, Patsy v. Board of Regents*, 102 S.Ct. 2557, 2564-66 (1983); *Parratt* v. *Taylor*, 451 U.S. at 553, n.13 (Powell, J. concurring). A copy of the old and new inmate grievance procedures and the United States Attorney General's certification are included in the Addendum at pp. 15, 4, 21, respectively.

"[t]his administrative remedy is sufficient to satisfy due process," because it could have fully compensated a prisoner for any property losses he suffered. *Irshad*, 543 F. Supp. at 927. It is, therefore, beyond doubt that Virginia provided Palmer with adequate postdeprivation remedies for his property loss.

D.

The Due Process Clause Does Not Protect Against Every Claim Of Governmental Abuse Of Power.

In an effort to shore up his due process claim, Palmer seeks to invoke a constitutional guarantee against governmental abuse of power. Brief of Palmer at 14-21. Whatever else can be said about such a cryptic notion, it can be safely stated that an official's abuse of power does not, as an abstract proposition, necessarily violate or even touch upon the Constitution.

Certainly, an abuse of power is not, standing alone, actionable under § 1983. As the Court stated in *Baker* v. *McCollan*, 443 U.S. 137, 146 (1979), "section 1983 imposes liability for violations of rights protected by the Constitution [and statutes], not for violations of duties of care arising out of tort law." Moreover, in *Paul* v. *Davis*, 424 U.S. 693, 701 (1976), this Court clearly held that the Due Process Clause cannot be used as the source of a font of tort law.

While on many occasions a violation of constitutional rights may stem from an abuse of power, it is the violation of the constitutional right, not the naked abuse of power, which gives rise to the § 1983 claim. To embrace the concept that the due process clause protects against all governmental abuses of power would require reversal of a substantial body of Due Process law, and subject federal courts to the possibility of judging every tortious state act.

II.

A PRISONER DOES NOT HAVE A CONSTITUTIONALLY PROTECTED RIGHT OF PRIVACY WHICH INSULATES HIM FROM SEARCH BY A PRISON GUARD.

In his Motion Against Summary Judgment, Palmer stated he "realizes that routine shakedowns are necessary to properly run a prison. . . ." (App. at 21). In his brief, Palmer seems to acknowledge that random prison searches are permissible, provided they are for a legitimate purpose such as seeking contraband. Brief of Palmer at 24. Palmer next suggests, however, that if the search is for impermissible reasons, such as harassment, then it is unreasonable and violates the Fourth Amendment. Thus, Palmer would turn the existence of a constitutional violation, not upon the nature of the action and its consequences upon the inmate, but solely upon the subjective intent of the perpetrator. Such a rule cannot work.

The Court of Appeals' approach was somewhat different. Whether resting upon a Fourteenth Amendment right of privacy or a Fourth Amendment "legitimate expectation of privacy," the Court found that a right of privacy exists in prison and that right was entitled to constitutional protection. Such an approach is at odds with the analysis embraced by this Court in *Katz* v. *United States*, 389 U.S. 347 (1967), and applied as recently as *United States* v. *Knotts*, 103 S.Ct. 1081 (1983).

While "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed . . .," *United States* v. *United States District Court*, 407 U.S. 297, 313 (1972), it is not the only environment in which a person is accorded Fourth Amendment protection. But, it is clear that protection does not exist when the person does not subjectively anticipate it and society is not

prepared to recognize it as reasonable. *Smith* v. *Maryland*, 442 U.S. 735, 740-741 (1979) (cited in *Knotts*, 103 S.Ct. at 1085).

With respect to the first test, it is clear from his own pleadings that Palmer does not subjectively expect to be free of searches while confined in prison. What he expects is simply to be free from harrassment, and he may obtain such relief without burdening the Fourth Amendment.[18]

With respect to the second test, society is not prepared to accord inmates freedom from careful surveillance—surveillance which is for the protection and benefit of the inmate, the guard and society. While inmates admittedly retain certain constitutional rights, they have surrendered the right to be free from scrutiny and surveillance. They may have an interest in protection from undue intrusion in their affairs by other inmates, but society has not extended a veil between the prisoner and the watchful eye of the guard. For this Court to do so now is in neither the best interest of the inmate nor the best interest of society.

CONCLUSION

In cases where a deprivation of private property has occurred at the hands of the State, this Court, through Justice Brandeis, has observed that "mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate." *Phillips* v. *Commissioner*, 283 U.S. 589, 596-97 (1931). Indeed, this Court has never held

[18] Harrassment, as indicated in Brief on Behalf of Petitioner at 18, may be addressed in several ways. If it rises to the level of a constitutional violation, it may be attacked under the Eighth Amendment. Similarly, if it involves a taking of liberty without due process, it may be attacked under the Fourteenth Amendment. There are also various tort theories available under state law and, finally, the inmate may obtain relief under the Inmate Grievance Procedure.

that a predeprivation hearing is mandated in all cases involving property losses. Moreover, this Court's decisions make clear that adequate postdeprivation process will satisfy the dictates of the Due Process Clause where the property loss results from a public emergency or where it is impractical to provide a predeprivation hearing.

In *Parratt* v. *Taylor*, 451 U.S. 527 (1981), the Court held that a claim for relief under 42 U.S.C. § 1983 had not been stated where Nebraska prison officials by random and unauthorized conduct negligently lost a prisoner's property, because the state provided an adequate postdeprivation remedy which could fully compensate the prisoner for his loss. This Court emphasized the random and unauthorized nature of the taking and the practical inability of the state to prevent it. Therefore, the Court reasoned that the provision of an adequate postdeprivation remedy avoided the conclusion that the taking violated the Fourteenth Amendment.

The same rationale is fully applicable here. The only difference of significance between *Parratt* and the instant case is that this case involves an allegation of an intentional taking. An intentional taking resulting from the random and unauthorized acts of a guard is not more predictable or controllable by the state than an unintentional taking. Accordingly, analysis must focus on the adequacy of the postdeprivation remedies afforded by Virginia. These remedies do satisfy the requirements of the Fourteenth Amendment. Thus, the holding in *Parratt* controls the disposition of this case. Accordingly, that portion of the decision of the Court of Appeals should be affirmed.

Finally, there can be little doubt that Palmer himself recognizes the inherent limitations on an expectation of privacy in prison. Brief of Palmer at 22-23. Society is un-

able to accord him such a right and, under the decisions of this Court, as a matter of law, none should be found. The Fourth Amendment does not obtain in prison, and the decision of the Court of Appeals on this issue should be reversed.

Respectfully submitted,
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November 4, 1983

No. 82-6695-CFX
Status: GRANTED

Title: Russell Thomas Palmer, Jr., Petitioner
v.
Ted S. Hudson

Docketed:
May 4, 1983

Court: United States Court of Appeals
for the Fourth Circuit

Vide:
82-1630

Counsel for petitioner: Wyatt, Deborah C., Broaddus, William G.

Counsel for respondent: Broaddus, William G.

Entry	Date	Note	Proceedings and Orders
1	May 4 1983	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Jun 6 1983		Brief of respondent in opposition filed.
4	Jun 7 1983		DISTRIBUTF . June 23, 1983
5	Jun 23 1983	G	Motion of Palmer for leave to proceed in forma pauperis filed.
6	Jun 27 1983		Motion of Palmer for leave to proceed in forma pauperis GRANTED.
8	Jun 27 1983		Petition GRANTED. The case is consolidated with 82-1630 and a total of one hour is allotted for oral argument. **********
9	Aug 12 1983		Brief of petitioner Ted S. Hudson in 82-1630 filed. VIDED.
10	Aug 12 1983		Joint appendix filed. VIDED.
12	Sep 12 1983		Brief of respondent Russell Thomas Palmer, Jr. in 82-1630 filed. VIDED.
13	Oct 18 1983		CIRCULATED.
14	Oct 24 1983		SET FOR ARGUMENT. Wednesday, December 7, 1983. (3rd case) This case is consolidated with No. 82-1630. (1 hour)
15	Oct 26 1983		Request of October 24, 1983 for extension of time to file Hudson's reply brief on the merits denied by Clerk.
16	Nov 4 1983	X	Reply brief of petitioner Ted S. Hudson in 82-1630 filed. VIDED.
17	Nov 30 1983	X	Reply brief of petitioner Russell Thomas Palmer, Jr. filed. VIDED.
18	Dec 7 1983		ARGUED.